RULES ENABLING ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST AND SECOND SESSIONS

ON

(OVERSIGHT AND H.R. 4144)

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APRIL 21, 1983, AND MARCH 1, 1984

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RULES ENABLING ACT

THURSDAY, APRIL 21, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Berman, Moorhead, and Sawyer.

Staff present: David Beier, counsel; Joseph V. Wolfe, associate counsel; and Audrey K. Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

I thank the gentleman from California, noting his presence, Mr. Berman.

This morning, we are continuing a series of hearings on the operation of the Judicial Conference of the United States. During our first day of hearings, we heard from the chairmen of the conference committees dealing with court administration, magistrates, and probation.

Today's hearings will focus on the process by which the Federal judiciary and Congress go about promulgating Federal Rules of Practice and Procedure.

As our witnesses will describe in greater detail later in the hearing, the method by which rules are promulgated is generically called the Rules Enabling Act. These various statutes taken together constitute in part the delegation of congressional authority to the judiciary. Congress has provided that certain types of rules may be made effective in the Federal courts if they are issued by the Supreme Court and, in essence, not vetoed by the Congress.

The basic outlines of this process are the same today as they were when first passed in 1934. In the intervening nearly 50 years, there has never been a comprehensive congressional review of the rulemaking process.

Perhaps because of this lack of congressional attention to the process, there have been in recent years a series of snafus in the rulemaking process, for example, last Congress, we delayed the effective date of proposed civil rules changes because of alleged drafting mistakes.

The previous Congress, the House delayed the effective date of the proposed Rules of Criminal Procedure. Most significantly, as some members of this panel will recall, the promulgation of the

proposed Rules of Evidence lead to a tremendous amount of controversy in the legal community and in the Congress.

The problems that have arisen in the rulemaking process have been the subject of much scholarly debate and criticism. Recently, this issue was taken on by the American Bar Association, whose house of delegates adopted a strongly worded statement calling for drastic reforms in the way in which the Federal rules are issued.

The basic purpose of this morning's hearings is to perform oversight. First we must understand how the process works and whether there are any internal practices or procedures that could be changed to serve the public interest.

In addition, we will begin to explore whether any legislative changes are necessary in the rulemaking process. For example, we must explore whether the Supreme Court should be involved in the rulemaking process or if the Judicial Conference imprimatur on the rules itself would be sufficient.

Hopefully, one result of this hearing will be greater recognition of the importance that the various Federal rules have in the day-to-day administration of the Federal court system. We hope to construct a court system that is fair, efficient, and humane. We must pay attention to the methods by which important procedural issues are decided.

So first this morning, we are very pleased to greet an old friend of this committee who has testified before it in the past—not recently, however, regretfully—and I would like to therefore greet the Honorable Edward Thaxter Gignoux, representing the Judicial Conference of the United States.

Judge Gignoux is the chairman of the Standing Committee on Rules of Practice and Procedure of the Conference. The committee chaired by the Judge has major substantive responsibility for review of all of the procedural rules that govern the operations of the Federal court system.

By way of background, Judge Gignoux has been on the bench for over 25 years; having been first appointed by President Eisenhower in 1957. Judge Gignoux has served in many capacities within the Judicial Conference of the United States and has a well-deserved reputation for commitment to the improvement and reform of Federal court procedures.

Judge Gignoux, we ask you to come forward if you will and identify those who accompany you. We have your statement, Judge Gignoux, and you may proceed as you wish, either from that, or if you prefer, you might summarize.

TESTIMONY OF HON. EDWARD THAXTER GIGNOUX, CHAIRMAN, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY JOSEPH F. SPANIOL, JR., DEPUTY DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS; AND LELAND E. BECK, COUNSEL, LEGISLATIVE AFFAIRS OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Judge GIGNOUX. Thank you, Mr. Chairman, for your most gracious introduction. Let me say that if my present appearance before your committee is as charitably and hospitably received as

was my last appearance, I will leave here a very happy and well-satisfied Federal judge.

Mr. Chairman and distinguished members of this subcommittee, for the record, my name is Edward T. Gignoux; I am the Chief Judge of the U.S. District Court for the District of Maine, although I am about to assume a senior status on June 1 of this year after 25 years of service on the Federal bench.

I appear today, as you have indicated, Mr. Chairman, as the Chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure. I appear in response to your request for an explanation of the procedures by which Federal court rules are developed.

May I say that I am especially glad to be here and to have this opportunity, because I have perceived a great deal of misinformation exists concerning the functioning of the Rules Committees and exactly what our present procedures are.

I am accompanied, Mr. Chairman, by Joseph Spaniol, Esq., on my left, who I know is well known to you. Mr. Spaniol is the Deputy Director of the Administrative Office of the United States Courts and Secretary to the Rules Committees, including the Standing Committee of which I am Chairman.

On my right is Lee Beck, Esq., who has recently joined the Legislative Affairs Office of the Administrative Office.

I have, as you have indicated, Mr. Chairman, submitted a prepared statement. My oral remarks will simply highlight the contents of that statement, and then I will be most pleased to respond to any questions which you or the members of the subcommittee or staff may have.

I shall start, Mr. Chairman, with a very brief bit of history. It was in 1934, as you have indicated, that the Congress enacted the so-called Rules Enabling Act, which empowered the Supreme Court of the United States to prescribe by general rules the practice and procedure in civil actions in the U.S. district courts.

Pursuant to this act, the Supreme Court, in 1935, appointed a distinguished advisory committee. That committee drafted the first Federal Rules of Civil Procedure, which, after review the Supreme Court and submission to Congress, became effective in September 1938.

Since that time, Congress has granted the Supreme Court similar authority to prescribe criminal rules, appellate rules, bankruptcy rules, and rules of evidence.

The basic procedure which was used in drafting and promulgating the civil rules adopted in 1938 was followed for all rules proposals until 1958. Essentially a Court-appointed advisory committee, assisted by a reporter, prepared and circulated drafts, revised them following public comment, transmitted them directly to the Supreme Court, the Court reported them to Congress, and in practice, Congress permitted them to go into effect in accordance with the deadline prescribed by the statute.

By the late 1950's, however, it became evident that there should be a continuing machinery to study the operation of the Federal rules and to recommend amendments which might be needed. The demand for some such mechanism was met in 1958 by an amendment of the Judicial Conference Act which required the Conference

to carry on a continuous study of the operation of the rules and to recommend to the Supreme Court any desirable amendments or additions.

Since 1958, the Judicial Conference has discharged its rulemaking responsibility through a standing committee, the committee of which I am chairman, and advisory committees. At the present time, there are four active advisory committees, each assisted by a distinguished legal scholar as reporter. There is one committee for civil, one for criminal, one for bankruptcy and one for appellate procedures.

When the Federal Rules of Evidence were finally adopted in 1975, the Advisory Committee on Evidence was discharged, but I should say, Mr. Chairman, that consideration is being given at this time to reactivating that committee to review the experience under the new evidence rules.

Mr. KASTENMEIER. May I interrupt to inquire if the Standing Committee is the same as the Committee on Rules of Practice and Procedure?

Judge GIGNOUX. Yes; it is. It is the Standing Committee of the Judicial Conference on Rules of Practice and Procedure. For some reason, it is referred to customarily as just the Standing Committee.

Mr. KASTENMEIER. Yes.

Judge GIGNOUX. The Chief Justice, Mr. Chairman, in his capacity as the chairman of the Judicial Conference appoints the members of all these committees, both the Standing Committee and the advisory committees. The appointments are made generally for 4-year terms. The membership of all committees—and attached to my prepared statement is a list of the present members of these committees—is broadly based and widely distributed geographically. The membership consists of experienced judges, lawyers and law professors, who are selected by the Chief Justice because of their national recognition as being interested and having expertise in procedural matters. Supporting staff for the committees is provided by the Administrative Office through Mr. Spaniol's office. Since 1958, over 200 persons have participated as members of the rules committees.

The advisory committees and their reporters are the heart of the rulemaking process. They normally meet twice a year to consider draft proposals which have been prepared by the reporter. Input comes from a variety of sources, both solicited and unsolicited. Suggestions come from Justices of the Supreme Court, Members of Congress, congressional staff, the Department of Justice, the American Bar Association and its committees, the legal profession, both individual lawyers and members of large firms. The reporter himself generates many proposals, as do members of the various committees.

Recognizing that Congress has a distinctive and important role in the rulemaking process, several advisory committees in recent years have invited staff members of the House and Senate Judiciary Committees to attend their meetings and to participate.

When an advisory committee has agreed on a tentative proposal, that proposal is then widely circulated to the bench and bar for comment in printed form. Some 7,500 persons receive copies of draft civil rules amendments; approximately 8,000 persons receive

copies of proposed criminal rules amendments; and all proposals for rule changes are printed in the advance sheets of the various publishing company reporters and in other law-publishing services.

In the past, the committees have allowed a full year for public comment. In the last few years, in response to criticism that the length of time which was required to effect rule changes was too great, time for comment has been reduced. The result, as you might anticipate, has been criticism that the time is too short to permit some comments, particularly from organizations such as the ABA committees.

In recent years, also, Mr. Chairman, public hearings have been held on rules proposals. At these hearings, interested individuals and organizations are given an opportunity to express their views on proposed amendments and new rules.

Based on the comments received, both written and at the public hearings, the Advisory Committee will again review the draft proposals; frequently modifications will be made.

If a substantial change is made, the revised proposal is recirculated to the bench and bar for further comment. If the change is only stylistic, or perhaps an editorial change, or noncontroversial, recirculation is not deemed necessary.

The proposed amendments finally agreed upon by an advisory committee are sent on to the Standing Committee; that is, the committee which I chair. The Standing Committee normally meets twice a year, approximately 6 weeks in advance of the March and September meetings of the Judicial Conference. The chairman and reporter of the Advisory Committee usually attend the meeting to present and discuss with the Standing Committee any proposed rules changes being presented by the Advisory Committee.

In addition, Mr. Chairman, I should add that as chairman of the Standing Committee, I usually attend Advisory Committee meetings in a liaison capacity, so that generally I am familiar with its work. On occasions when I am unable to attend because of other commitments, a member of the Standing Committee will attend in my place.

I wish to emphasize, Mr. Chairman, that review by the Standing Committee is thorough; technical and stylistic changes are frequently made; and on occasion a proposal has been rejected and returned to the Advisory Committee for further study, when there has been a substantive concern by the Standing Committee.

Proposals which are approved by the Standing Committee are reported to the Judicial Conference, usually at its September meeting, with the recommendation that they be transmitted to the Supreme Court for its consideration. Normally the Conference has approved the rules as submitted and has transmitted them to the Supreme Court, but on occasion, the Conference also has rejected and returned a proposed rule change.

I cannot cast too much light on the Supreme Court deliberations because they are, of course, private. In recent years the Court has typically accepted the rules and transmitted them to Congress without modification. Indeed, there are three substantial sets of rules presently pending before the Court which we anticipate will be transmitted by the Court sometime between now and May 1.

I should mention that in 1971 the Court did return the draft evidence rules to the Conference for further circulation for comment and revision.

As you are aware, Mr. Chairman, the current Enabling Acts require the Supreme Court to transmit proposed rules to Congress during a regular session, but not later than May 1. Under the present acts, the rules automatically become effective unless Congress takes some action within 90 days—except for evidence rules, when the period of time is 180 days.

Mr. Chairman, what I have presented is a factual summary of our present practice. I shall close these oral remarks with a personal observation.

I think I can fairly state that the Federal rules of procedure are generally viewed to be among the most significant accomplishments of American jurisprudence. They stand as a model for the Nation; they have been adopted almost without change by the courts in many States; they have been characterized by scholars and others as one of the true success stories of American law. I sincerely believe, Mr. Chairman, the existing rulemaking process has served the Nation well when we consider the quality of the product which has resulted. The process can, of course, be improved, and we who are active on the rules committees will not cease to work toward that end. Indeed, Mr. Chairman, the Standing Committee will be meeting in June here in Washington. The principal item on our agenda will be a review of the internal procedures of the Standing Committee and of the advisory committees for the purpose of determining whether any of the numerous suggestions we have received from many sources should and can be adopted as worthwhile improvements.

May I assure you, Mr. Chairman, that we in the judiciary who are associated with the rulemaking process will welcome any further suggestions which you or your committee may have, and we will work with the Congress wholeheartedly in refining our present procedures.

Again, Mr. Chairman, I thank you and the members of the subcommittee for the privilege of appearing before you today. I shall be pleased to attempt to respond to any questions which you may have.

[The statement of Judge Gignoux follows:]

PREPARED STATEMENT OF HON. EDWARD THAXTER GIGNOUX, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MAINE AND CHAIRMAN OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

INTRODUCTION

Mr. Chairman, and Members of the Subcommittee, it is a pleasure—and a privilege—to participate in these oversight hearings on the federal court rulemaking process. I appear today as Chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure in response to your request for an explanation of the procedures by which federal court rules are developed. The Standing Committee on Rules of Practice and Procedure is responsible for coordinating the Conference's contribution to the development and amendment of the Federal Rules of Civil, Criminal and Appellate Procedure, the Federal Rules of Evidence and the Bankruptcy Rules.

One caveat before I proceed: I do not consider myself an expert on federal practice and procedure. I bring to the subject only the perspective of a federal district judge.

The rules of which we speak have been, however, the "tools of my trade" for the last quarter of a century.

I shall divide my testimony into three parts—a brief history of judicial rulemaking, a description of the present rulemaking process, and comments concerning several current criticisms of our present procedures. I think it important to focus individually on each of these areas—although there is naturally some overlap.

HISTORY OF JUDICIAL RULEMAKING

I shall start with a bit of history. Dean Roscoe Pound traced the source of judicial rulemaking back to the time of Richard II, King of England from 1377 to 1399. Tracking the development of court procedures through the reigns of the Tudor and Stuart kings, Pound pointed out that the procedural rulemaking power had resided for centuries in the King's courts at Westminster. "Hence," Pound observed, "if anything was received from England as part of our institutions, it was that the making of these general rules of practice was a judicial function." R. Pound, The Rulemaking Power of the Courts, 12 A.B.A.J. 599, 601 (1926). The reach of this inherent rulemaking power is a subject of continuing debate. It need not, however, be considered here since current rulemaking by the federal courts is carried on under various statutory grants of authority, in recognition of the fact that the development of rules of practice and procedure has long been the common concern of both the Congress and the federal courts.

Congress first granted rulemaking authority to the federal courts in the Judiciary Act of 1789. Act of September 24, 1789, ch. 20, 1 Stat. 73. Section 17 of the 1789 Act provided that the courts of the United States shall have power "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States." 1 Stat. 83.

In 1793, and again in 1842, Congress reaffirmed its grant of power to the federal courts to promulgate rules of practice and procedure. Act of March 2, 1793, ch. 22, §7, 1 Stat. 333, 335; Act of August 23, 1842, ch. 188, § 6, 5 Stat. 516, 518.[1] The 1842 statute specifically recognized the power of the Supreme Court to promulgate rules of practice and procedure for cases at common law, in equity, and in admiralty:

"That the Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein." (5 Stat. 518.)

The Supreme Court adopted the first set of equity rules in 1822, 7 Wheat. (20 U.S.) v (1822), and adopted the first admiralty rules in 1845, 3 How. (44 U.S.) iii (1845). The Court did not, however, adopt general rules for cases at common law, and, for many years, in the absence of any federal rules, the district and circuit courts followed the practice and procedural rules of the States in which they sat. In the Conformity Act of 1872, Congress by statute established the diverse State rules of procedure as the rules of procedure for the federal trial courts. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

It was not until the 1930's, under the guidance of Attorney General Homer S. Cummings, that authority over rulemaking was revested in the Supreme Court. The Rules Enabling Act of 1934 once again empowered the Supreme Court to "prescribe by general rules . . . the practice and procedure" of the United States district courts. As amended, that Act now provides:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

---

[1] See, *Wayman* v. *Southard*, 10 Wheat. (23 U.S.) 1 (1825).

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court." (28 U.S.C. § 2072.)

Pursuant to the 1934 Act, the Supreme Court in 1935 appointed a distinguished advisory committee. The committee drafted the first Federal Rules of Civil Procedure, which, after review by the Supreme Court and submission to Congress, became effective in September 1938. Congress has since granted the Supreme Court similar authority to prescribe Criminal Rules (18 U.S.C. § 3771); Appellate Rules (28 U.S.C. § 2072; 18 U.S.C. § 3772); Bankruptcy Rules (28 U.S.C. § 2075); and Evidence Rules (28 U.S.C. § 2076). The statutes are appended to this statement. (Appendix A).

The basic procedure used in drafting and promulgating the civil rules adopted in 1938 was followed for all rules proposals until 1958: a Court-appointed advisory committee, assisted by a reporter, prepared and circulated drafts, revised them following public comment, and transmitted them directly to the Supreme Court; the Court, after review, reported them to Congress, which, in practice, permitted them to go into effect in accordance with the prescribed deadline. By the late 1950's, however, it became evident that there should be continuing machinery to study the operation of the federal rules and to recommend amendments when needed. The demand for some such mechanism was met by a 1958 amendment of the Act creating the Judicial Conference of the United States, to require the Conference to carry on a continuous study of the operation of the rules, and to recommend to the Supreme Court desirable changes and additions. (28 U.S.C. § 331). Since 1958, the extensive work of developing new rules and rules amendments has been carried on under the aegis of the Judicial Conference.

CURRENT RULEMAKING PROCEDURES

The Judicial Conference discharges its rulemaking responsibility through a Standing Committee on Rules of Practice and Procedure and several advisory committees, as well as its own consideration of each proposed change. The Chief Justice, in his capacity as Chairman of the Judicial Conference, appoints the members of these committees, generally for four-year terms. The membership of all committees is broadly based and widely distributed geographically, and consists of experienced judges, lawyers and law professors, nationally recognized for their interest in judicial procedure. Supporting staff is provided by the Administrative Office of the United States Courts.

There are five major steps in the rulemaking process: (1) the advisory committees, (2) the Standing Committee, (3) the Judicial Conference, (4) the Supreme Court, and (5) the Congress. I shall now describe each of these steps in some detail.

The Advisory Committees

The advisory committees and their reporters are the heart of the rulemaking process. They normally meet twice a year (usually for two days) to consider draft proposals prepared by the reporter. At the present time there are four advisory committees, assisted by distinguished legal scholars as reporters, one each in the fields of civil, criminal, bankruptcy and appellate procedure. [With the adoption of the Federal Rules of Evidence in 1975, the Advisory Committee on Evidence Rules, which originally formulated these rules, was discharged. Consideration continues to be given to reactivation of that committee.]

The composition of each of the advisory committees is worth noting. The Advisory Committee on Civil Rules is currently composed of 15 members: two circuit judges; four district judges; eight practicing attorneys (one of whom is from the Department of Justice); and a law professor. The Advisory Committee on Criminal Rules is composed of 11 members: one circuit judge; six district judges and four practicing attorneys (one of whom is from the Department of Justice and one of whom is a federal public defender). The Advisory Committee on Appellate Rules is the smallest of the advisory committees with only eight members: four circuit judges, one judge of the Court of International Trade and three practicing attorneys (including the Solicitor General). Finally, the Advisory Committee on Bankruptcy Rules is composed of 13

members: one circuit judge, two district judges; four bankruptcy judges; five practicing attorneys and a law professor. Since 1958, over 200 individuals have served on rules committees. I have attached a current list of committee members and reporters to this statement for your convenience. (Appendix B.)

The rules committees have devised various procedures to encourage public participation in the process of drafting and promulgating procedural rules. Ideas and suggestions for new rules, and changes in existing rules, directed to the Standing Committee are automatically referred by the staff of the Administrative Office to the chairman of the appropriate advisory committee and its reporter. "Input" comes from a variety of sources: Justices of the Supreme Court, judges of other federal courts, Members of Congress, the Department of Justice, the American Bar Association, research and scholarly literature, the legal profession, the reporter, and committee members. The chairman and reporter of the advisory committee determine a program of study based upon suggestions and comments received, as well as independent studies by the reporter. The reporter then prepares draft materials for consideration by the advisory committee.

When an advisory committee has reached agreement on a tentative proposal, the draft is widely circulated to the bench and bar for comment. The Administrative Office maintains a list containing the names of 7,500 persons who are to receive copies of draft amendments to the civil rules. The list of those to receive proposed amendments to the criminal rules consists of approximately 8,000 names. Through the courtesy of the West Publishing Company, all proposals for rules changes are printed in the advance sheets to the Supreme Court Reporter, Federal Reporter, Federal Supplement and Federal Rules Decisions. In addition, the proposals are included in the bound volumes of Federal Rules Decisions, where they are permanently available. Other legal publishing firms are simultaneously notified of any proposals for rules changes and are requested to make them available to their subscribers. The Matthew Bender Company regularly includes proposed bankruptcy rules changes in its publications.

The Judicial Conference resolution of 1958 establishing the rules program suggested that, except in unusual situations, a period of no less than six months be allowed for the receipt of public comment. (Conf. Rept. March 1958, p. 6.) In the past, a full year has been allowed for public comment, but the time for comment has been reduced in response to criticism of the length of time required to effect rules changes. The result has been criticism that the time is now too short, that individuals and organizations require more time in order to formulate useful comments.

In recent years the advisory committees have also held public hearings at which interested individuals and persons representing various organizations are invited to express their views on proposals to change the rules. Thus every effort is made to achieve Chief Justice Earl Warren's objective, announced in April 1960, that "every judge, practicing lawyer, and legal scholar will be afforded the opportunity to participate—to state his views—with the assurance that those views will be given consideration." E. Warren, Committees on Rules of Practice and Procedure of the Judicial Conference of the United States (April 4, 1960) reprinted in 28 U.S.C.A. F.R.Civ.P. xvii, xviii (1960).

Based on the comments received, the advisory committees may modify the draft proposals. Usually the changes are technical or editorial in nature. If, however, an advisory committee alters a draft proposal in any substantial way, the new proposal is recirculated to the bench and bar for further comment. Proposed rules amendments finally agreed upon by an advisory committee are then sent to the Standing Committee.

The report of an advisory committee to the Standing Committee consists of three parts: (1) the draft rules, (2) the advisory committee's notes explaining the purpose, language and intent of the draft rules, and (3) a summary of the consideration given to the comments received.

The Standing Committee

The Standing Committee is currently composed of eight members: two circuit judges, two district judges, two practicing attorneys, and two law professors. The Committee normally meets twice a year, approximately six weeks in advance of the March and September meetings of the Judicial Conference. The chairman and reporter of an advisory committee usually attend to present advisory committee proposals. In addition, the chairman or a member of the Standing Committee usually attends the advisory committee meetings in a liaison capacity. Review by the Standing Committee is thorough; technical and stylistic changes are frequently made. On occasion a proposal has been rejected or returned to the advisory committee for further study. If the Standing Committee is satisfied that a proposal has merit and

that the public has had adequate opportunity to comment, the proposal will be reported to the Judicial Conference.

In March 1980, the Standing Committee requested and received authorization from the Judicial Conference to make available to any interested person on request any report or accompanying document submitted to the Standing Committee by an advisory committee. (Conf. Rept. March 1980, pp. 54-55). In addition, the written comments on proposed rules received by the advisory committee, the transcripts of public hearings and the Standing Committee reports to the Judicial Conference are available for inspection. Individuals who are interested in the development of the rules may obtain access to these records by contacting the secretary of the committees at the Administration Office.

The Judicial Conference

Proposals approved by the Standing Committee are reported to the Judicial Conference, usually at its September meeting, with the recommendation that they be transmitted to the Supreme Court for its consideration. Normally, the Conference has approved the rules as submitted and has transmitted them to the Supreme Court, but on occasion the Conference has rejected or returned a proposal.

I should say a word at this point about the timing of the meetings. I have already indicated that the Standing Committee meets approximately six weeks before a session of the Judicial Conference. This is the shortest time within which the report of the Standing Committee can be distributed to the Judicial Conference and digested by each member. The Judicial Conference normally considers rules changes in September, and, if a change is approved, forwards the report to the Supreme Court immediately. Thus, the Supreme Court is afforded approximately seven months to consider any proposals before the May 1 statutory deadline for transmittal to the Congress.

The Supreme Court

The Supreme Court deliberations are, of course, private. In recent years, the Court has typically approved rules changes and transmitted them to Congress without modification. In 1971, however, the Court did return the draft evidence rules to the Conference to provide an opportunity for public consideration of the modifications made by the advisory committee, the Standing Committee and the Judicial Conference since the last preliminary draft was circulated. Conf. Rept. March 1971, p. 21.

The Congress

The current Rules Enabling Acts require the Chief Justice, on behalf of the Court, to transmit promulgated rules to Congress during a regular session—but not later than May 1—and the rules automatically become effective unless Congress takes some legislative action within 90 days (180 days for Evidence Rules). Until 1972, Congress permitted all such proposals to go into effect without change. In 1972, however, Congressional reaction to the evidence rules, particularly those relating to privilege—to which there were objections—marked the beginning of a new era. Congress deferred the effective date of the evidence rules and made major revisions before they were finally approved in 1975. On other occasions in recent years Congress has similarly deferred the effective date of proposed civil and criminal rules to give itself more time for study. Occasionally changes have been made.

CURRENT ISSUES IN THE RULEMAKING PROCESS

In the last few years, interest in federal rulemaking has spurred increased discussion, criticism and proposals for change. Commentators have discussed alleged problems and have suggested reforms. Judge Weinstein, Professors Clinton, Friedenthal and Lesnick, the American Bar Association and the Public Citizen Litigation Group, as well as some Members of the House and Senate Judiciary Committees have raised questions. Several years ago the Federal Judicial Center commissioned a study of the rulemaking process, copies of which I have forwarded for the use of the Subcommittee. The Chief Justice has personally noted these developments and observed that the federal rulemaking procedures may require a "fresh look." W. Burger, The State of the Federal Judiciary, 1979, 65 A.B.A.J. 358, 360 (1979).

For the most part the comments and discussion have centered on improving the procedure by which new rules are formulated and existing rules amended. No one, to my knowledge, has suggested drastic changes in the overall process. I assure you, Mr. Chairman and Members of the Subcommittee, that the Judicial Conference, the Standing Committee and the advisory committees are all concerned with improving

the procedure and are amenable to suggestions. I would like to comment here on five questions which have been raised.

(1) Is the Membership of the Advisory Committees and of the Standing Committee Representative?

I believe it is.

A number of questions have been raised along this line: Are the present committees elitist? Are all segments of the legal profession adequately represented? Should various social and economic interests be represented?

On the whole, I would say the present rules committees are broadly representative. The committees are relatively small bodies. As I have previously observed, they include experienced judges, members of the bar and law professors, widely distributed geographically and chosen from diverse professional backgrounds. The primary criteria for their appointment is professional ability and experience. Further, I do not believe that a representation of social and economic interests, per se, is essential to the work of the rules committees. The committees deal in practical questions of procedure; they do not determine social or economic policy.

(2) Is the Process Sufficiently Open and Does it Present Adequate Opportunity for Public Participation?

I think these questions also may be answered in the affirmative. As I have already suggested, proposals for changes in the rules are received from diverse sources; proposed drafts by the advisory committees, together with the reporter's notes, are widely circulated; public hearings are held on these drafts; the comments received, the transcripts of public hearings, and the advisory committee and Standing Committee reports are available to the public. The actions taken by the Judicial Conference are summarized in its reports. The final draft of new rules and rules amendments, as submitted to the Supreme Court, are also publicly available at the Administrative Office.

Suggestions have been made that all Committee meetings should be public. I question whether it is either wise or necessary to have the public present at drafting sessions. I am apprehensive that public meetings would inhibit the kind of frank and candid discussion of controversial proposals possible only within a small deliberative group. It would be impossible to formulate rules changes without such frank discussions. In addition, I doubt that the public generally, or even members of the bar, would derive significant benefit from "monitoring" these discussions.

Both the advisory committees and the Standing Committees solicit commentary from a wide range of sources, and the formal documents at every step of the rulemaking process are publicly available. I doubt that more than this can be done without sacrificing other important values.

(3) Does the Rulemaking Process Take Too Long?

The study by the Federal Judicial Center suggests that the time involved from the initiation of proposed rules changes until they become effective may be too long. I would guess that the average time would be about two and one-half years. A great deal of this time is devoted to circulation of draft proposals and the solicitation of public comments. Very little time elapses between the report of the advisory committee and the final consideration by the Judicial Conference. Deference to the Supreme Court's workload requires that the Court be given six or seven months to consider a change in the rules. Congress must also be permitted adequate time to consider proposed rules amendments. All in all, I think that the advisory committees may be able to reduce the time somewhat, but care must be taken not to foreclose helpful suggestions and comments from the bar and the public.

(4) What Should be the Role of the Supreme Court in Judicial Rulemaking?

In responding to this question, I should note two caveats. First, the role of the Supreme Court in the rulemaking process has been widely debated and I have no clear answer. Second, I would not pretend to speak for the Court; the Justices' views, which should be given great weight, are for them to make known. Nonetheless, questions of the Court's role abound: Can the overburdened Justices give proposed rules the kind of close study needed? Is the Court's approval really meaningful, or simply perfunctory? Can the Justices objectively adjudicate the validity of a rule which they have promulgated when it is challenged in subsequent litigation?

Justices Frankfurter, Black and Douglas—and more recently Justice Powell, writing for himself and Justices Stewart and Rehnquist, in dissenting from the promulgation of the recent discovery amendments to the civil rules—have expressed concern about the Court's "largely formalistic" rulemaking role. Some have suggested shifting the promulgating function to the Judicial Conference. On the other hand, some feel that the prestige and authority of the Court are important to acceptance of the rules.

For my part, I think this would be a fruitful focus for further discussion. The views of the Justices themselves should be obtained. If the Court has substantial questions about its own capacity to consider recommended rules changes because of its ever increasing caseload, elimination of the Court's formal transmittal of proposed rules changes to Congress may be desirable. I would then suggest that the present function of the Supreme Court be vested in the Judicial Conference.

(5) Is the Present Congressional Review Procedure Satisfactory?

Most would agree, I believe, that extensive rewriting of rules by Congress tends to undermine the rulemaking process, and may not produce the best results. On the other hand, Congress has an interest in rulemaking.

I think a more important question for the rules committees is whether there are better ways, at an earlier stage in the rulemaking process, of taking into account the views of the Members of the House and the Senate Judiciary Committees. When there is a widely expressed concern about a proposed rule to which Congress must be responsive, can this be anticipated and incorporated into the drafting process? Should Members of Congress serve on the rules committees? At a minimum, continuing liaison between the advisory committees and the Congressional staffs should be encouraged, and an active effort should problably be made to solicit the views of Congressional representatives and to ensure that they are more fully informed of the considerations underlying rules formulation or amendment. To this end, the advisory committees in recent years have invited staff counsel of the House and Senate Judiciary Committees to attend their committee meetings. We would appreciate your views as to other steps which should be taken to achieve a closer relationship with Congress during the drafting of new rules and rules amendments.

CONCLUSION

I shall close with a personal observation. The federal procedural rules are generally viewed to be among the most significant accomplishments of American jurisprudence. The federal rules have served as a model for procedural reform in most States. Indeed, many States have adopted the Federal Rules of Civil Procedure, virtually without change. This is one of the true success stories of American law.

The existing rulemaking process has served the nation well. The rulemaking process can, of course, be improved and we should not cease to work toward that end. For our part, the judicial branch welcomes suggestions and will cooperate wholeheartedly with the Congress in implementing any desirable improvements.

I thank you, Mr. Chairman and Members of the Subcommittee, for the privilege of appearing before you today.

§ 3402. Rules of procedure, practice and appeal

In all cases of conviction by a United States magistrate an appeal of right shall lie from the judgment of the magistrate to a judge of the district court of the district in which the offense was committed.

The Supreme Court shall prescribe rules of procedure and practice for the trial of cases before magistrates and for taking and hearing of appeals to the judges of the district courts of the United States.

(June 25, 1948, ch. 645, 62 Stat. 831; Oct. 17, 1968, Pub. L. 90-578, title III, § 302(b), 82 Stat. 1116.)

§ 3771. Procedure to and including verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(June 25, 1948, ch. 645, 62 Stat. 846; May 24, 1949, ch. 139, § 59, 63 Stat. 98; May 10, 1950, ch. 174, § 1, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(k), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(g), 73 Stat. 11; Oct. 17, 1968, Pub. L. 90-578, title III, § 301(a)(2), 82 Stat. 1115.)

§ 3772. Procedure after verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(June 25, 1948, ch. 645, 62 Stat. 846; May 24, 1949, ch. 139, § 60, 63 Stat. 98; July 7, 1958, Pub. L. 85-508, § 12(*l*), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(h), 73 Stat. 11.)

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 102, 63 Stat. 104.)

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 103, 63 Stat. 104; July 18, 1949, ch. 343, § 2, 63 Stat. 446; May 10, 1950, ch. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub. L. 89-773, § 1, 80 Stat. 1323.)

§ 2075. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(Added Pub. L. 88-623, § 1, Oct. 3, 1964, 78 Stat. 1001.)

§ 2076. Rules of evidence

The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress.

(Added Pub. L. 93-595, § 2(a)(1), Jan. 2, 1975, 88 Stat. 1948, and amended Pub. L. 94-149, § 2, Dec. 12, 1975, 89 Stat. 806.)

Appendix B

Committee on Rules of Practice and Procedure

Edward T. Gignoux, Chairman	Dis.J., Portland, ME
Edward H. Hickey	Esq., Chicago, IL
James S. Holden	Dis.J., Rutland, VT
Amalya L. Kearse	Cir.J., New York, NY
Francis N. Marshall	Esq., San Francisco, CA
Wade McCree	Prof., Ann Arbor, MI
Carl A. McGowan	Sr.Cir.J., Washington, DC
Frank J. Remington	Prof., Madison, WI

Advisory Committee on Appellate Rules

Pierce Lively, Chairman	Cir.J., Danville, KY
E. Milton Farley, III	Esq., Richmond, VA
J. Smith Henley	Sr.Cir.J., Harrison, AR
Rex E. Lee	Sol.Gen., Washington, DC
Edward D. Re	Int'l Trade, New York, NY
Ira C. Rothgerber	Esq., Denver, CO
Edward A. Tamm	Cir.J., Washington, DC
Eugene A. Wright	Cir.J., Seattle, WA
Kenneth F. Ripple, Reporter	Prof., Notre Dame, IN

Advisory Committee on Bankruptcy Rules

Ruggero J. Aldisert, Chairman	Cir.J., Pittsburgh, PA
Clive W. Bare	Bkcy.J., Knoxville, TN
John T. Copenhaver, Jr.	Dis.J., Charleston, WV
Robert W. Foster	Prof., Columbia, SC
Asa S. Herzog	Esq., Ft. Lauderdale, FL
Charles A. Horsky	Esq., Washington, DC
Herbert Katz	Bkcy.J., San Diego, CA
Richard L. Levine	Esq., Washington, DC
Beryl E. McGuire	Bkcy.J., Buffalo, NY
Norman H. Nachman	Esq., Chicago, IL
Alexander L. Paskay	Bkcy.J., Tampa, FL
Joseph Patchan	Esq., Cleveland, OH
Morey L. Sear	Dis.J., New Orleans, LA
Lawrence P. King, Reporter	Prof., New York, NY
Walter Taggart, Co-Reporter	Prof., Villanova, PA

Advisory Committee on Civil Rules

Walter R. Mansfield, Chairman	Sr.Cir.J., New York, NY
David J. Anderson	Justice Dept., Washington,DC
Reece Bader	Esq., San Francisco, CA
William T. Kirby	Esq., Chicago, IL
Arthur L. Liman	Esq., New York, NY
Thomas S. Martin	Esq., Washington, DC
C. A. Muecke	Dis.J., Phoenix, AZ
Louis F. Oberdorfer	Dis.J., Washington, DC
J. Vernon Patrick, Jr.	Esq., Birmingham, AL
Philip Pratt	Dis.J., Detroit, MI
Paul G. Rogers	Esq., Washington, DC
Maurice Rosenberg	Prof., New York, NY
Walter Jay Skinner	Dis.J., Boston, MA
Joseph F. Weis, Jr.	Cir.J., Pittsburgh, PA
Charles E. Wiggins	Esq., Washington, DC
Arthur R. Miller, Reporter	Prof., Cambridge, MA

Advisory Committee on the Criminal Rules

Walter E. Hoffman, Chairman	Sr.Dis.J., Norfolk, VA
Eugene A. Gordon	Sr.Dis.J., Greeensboro, NC
Richard A. Green	Esq., Washington, DC
James F. Hewitt	FPD, San Francisco, CA
William L. Hungate	Dis.J., St. Louis, MO
D. Lowell Jensen	Justice Dept., Washington, DC
Frederick B. Lacey	Dis.J., Newark, NJ
Leland C. Nielsen	Dis.J., San Diego, CA
Roger Robb	Sr.Cir.J., Washington, DC
Leon Silverman	Esq., New York, NY
Russell E. Smith	Sr.Dis.J., Missoula, MT
Wayne LaFave, Reporter	Prof., Champaign, IL

Mr. KASTENMEIER. We are grateful to you, Judge Gignoux, for reviewing for us not only the history, but indeed the law and the practice of the procedures and advisory committees and the Standing Committee with respect to the rules changes.

While you did not discuss it in your oral testimony, you raised five questions concerning what you termed "current issues" in your text and you proceeded to answer them. Would you conscientiously say that those five questions you raised represent whatever serious criticism or comment there has been in recent years with respect to the rulemaking process?

Judge GIGNOUX. Mr. Chairman, in raising these questions, I, of course, reviewed the report, which has been submitted to this committee, of the Federal Judicial Center. This report analyzes the scholarly comment and criticisms which have been made. My purpose was to set forth the questions which have been raised and to indicate the views of the standing committee concerning them.

I think we can break down the discussion into two broad categories: The first and most significant question relates to the function of the Supreme Court. As I set out in my written statement, this has been the subject of considerable debate. My sense as Chairman of the Standing Committee and the sense of my colleagues is that the views of the Court itself should be ascertained before that question is finally resolved. The competing considerations are set forth in my written report. I will review them at this time if it will be helpful.

The second basic question is whether the rulemaking committees are adequately representative and the rulemaking process is sufficiently open. I have endeavored in my written submission to indicate our view that while undoubtedly some improvements can be made, overall, the committees, which are appointed by the Chief Justice, broadly represent different segments of the profession, particularly including those individuals who have indicated, through their writing, experience, practice, and otherwise, an interest and expertise in this technical field with which we deal. As far as openness is concerned, I believe our views are set forth in the written submission. I would be happy to amplify those at this time if it would be helpful to the committee.

Mr. KASTENMEIER. I gather that as far as the role of the Supreme Court is concerned, it is generally understood, if officially not confirmed, that the Supreme Court's recent role has been rather passive. Perhaps other commentators will think differently of it. It may be irrelevant so long as the Court in modern times is taking a pro forma, approval role, rather than an actual interested role in the rules themselves.

Reading between the lines I would gather that they are not, by and large, devoting very much time to scrutiny of the new rules that evolve from these advisory committees, the Standing Committee and the Judicial Conference itself.

Judge GIGNOUX. We are somewhat handicapped, of course, Mr. Chairman, because we are not invited into their conferences.

Mr. KASTENMEIER. I see.

Judge GIGNOUX. I can only refer——

Mr. KASTENMEIER. But I think the point you make is that the Court did return draft evidence rules in 1971, but has not for other matters, presumably, in the last decade or two.

Therefore, it would seem that if they are that uncritical, they view their role as largely pro forma in approval.

Judge GIGNOUX. I agree. I mention in my prepared statement that Justice Powell, who dissented from the promulgation of the last civil rules, expressed his concern about what he referred to as the Court's "largely formalistic rulemaking role." But I was interested to observe that Justice Powell himself apparently had given rather close attention and study to the rules proposals in question because he was very critical of the fact that the discovery amendments did not go as far as he had wished.

Incidentally, the proposals which have just been submitted and are before the Court at this time will perhaps respond to some extent to his concern.

Mr. KASTENMEIER. This observation is relevant because one of the major problems confronting this committee and Congress with respect to so-called court reforms is the heavy, heavy load on the Supreme Court and on the Chief Justice himself. The result of that is to ask how can they find time to review, from time to time, the rules that come up to them. Perhaps it might be possible on some individual basis, as each Justice may be personally so interested, but institutionally, can we rely on that? I think that probably is part of a larger picture.

With respect to other comments, that of openness, I gather that the Judicial Conference has resisted opening up the procedures. It is difficult from our perspective to judge that. Our proceedings are different, in fact, and merely because we find that openness works in the legislative branch does not necessarily mean that it would similarly work in the judicial process.

Nonetheless, I take it that there is general resistance to opening up proceedings I suppose we would call "markup," to the public because, as you suggest, you offer the comment that "There is an apprehension that public meetings would inhibit the kind of frank and candid discussion of controversial proposals possible only within a small deliberative group." I take it that that is still the predominant view of your colleagues.

Judge GIGNOUX. As I indicated in my oral statement just now, the Standing Committee will be meeting in June, June 17, here in Washington. The principal item on our agenda will be a review of the operating procedures of the committee with particular reference to the American Bar Association resolution and also the views presented by Mr. Morrison of the Public Citizens Litigation Group, both of which I understand will be presented to you today.

There are several proposals made by those organizations which should certainly be seriously considered. To the extent those proposals have merit, undoubtedly, we will modify our procedures to accommodate them. There are some suggestions, however, which we feel accord with our present practice. For example, our present procedures, which I have tried to outline, provide for the publication of proposals and so forth.

Whether open meetings of the advisory committees are practical or appropriate is an issue upon which I think I can say the Stand-

ing Committee has very strong views. The advisory committees are drafting groups. I would analogize their work to the work of your staff. When the committees have completed their drafting, the proposals are printed, circulated, and published in the Legal Services. They are thus available generally.

In recent years, and we intend to continue the practice, public hearings have been held. On the current criminal rules amendments, hearings were held a year ago February in Washington, Chicago, and San Francisco. There was ample opportunity for those interested to present their views.

I question that there would be any benefit to the public or others if the advisory committees drafting sessions were open meetings.

As far as the Standing Committee is concerned, our function is not a drafting one; we make technical and conforming changes to be sure the proposals are consistent with what other committees have been doing. If there is any substantive problem presented by a rule, it is returned to the advisory committee for further study and comment.

I question whether there is anything the Standing Committee does which would be of any public interest. I might add, Mr. Chairman, having sat through these meetings, that we may be doing a kindness to the public and the press if we do not subject them to the chore of having to do so.

Mr. KASTENMEIER. I appreciate that. Before I yield to my colleagues, I just wanted to make one other comment because I think it may be important in how people may look at this. Would you not concede that it is a fact that in the intervening 49 years, from 1934, that the number of rules—bankruptcy, evidence rules, criminal civil procedure and the like—have not only grown enormously, but the importance of the rules themselves in the Federal judicial system is so pervasive and overriding that anyone concerned with practice in the federal system has to be very concerned about what the rules are, how they are reached, and what the processes are.

Judge GIGNOUX. When I am on the bench, I have three volumes always with me: the civil rules, the criminal rules, and the evidence rules. These contain the rules themselves, the advisory committee notes, and whatever has been added by the committees of Congress. They are certainly essential to my judicial function.

In other words, I would agree with you that they have become a very important part of the judicial process.

Mr. KASTENMEIER. But I think that the concern for the growing apprehension, to the extent that that exists in the bar and elsewhere, is not merely that the process has changed, but that the number of rules and the impact of the rules is enormous to practitioners. If they are not in some sense allowed to participate, they sense that perhaps the monitoring process is not availing to them.

In any event, I would like to yield to the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman.

Judge Gignoux, glad to have you here today.

Judge GIGNOUX. Very happy to be here, sir.

Mr. MOORHEAD. On page 9 of your statement, you indicated that the proposed Federal Rules of Evidence were transmitted to Congress in 1972. The final approval was not obtained until 1975. In

your opinion, could this time lag of 3 years have been reduced if Members of Congress had served on the advisory committee and thus been involved in the formulation of proposed rules from the very beginning?

Judge GIGNOUX. Would it have helped?

Mr. MOORHEAD. Yes.

Judge GIGNOUX. Undoubtedly. May I say, very possibly because of the experience with the evidence rules—and please understand, I have been Chairman of this Committee for only 2 years, so that I was not active at the time the evidence rules were being considered—we have endeavored to bring Congress into the process by inviting staff members of the appropriate committees to attend the advisory committee meetings. We have discovered very recently that perhaps that development has not been as effective as it might have been because the staff members have not, in some instances, been furnished with sufficient advance notice and have not been furnished the materials in advance. That is a procedure which we are hoping to improve.

As far as the Members of Congress themselves are concerned, their participation might be helpful, but I wonder if you do not have enough to do without sitting through 2 days of discussion of the details of procedural rules.

Mr. MOORHEAD. I think that Members of Congress have a lot to do, but of course, sometimes if the key people can be involved, it is a whole lot easier for them to get enthusiastic and be able to get things approved. We only have to look at the Supreme Court ruling yesterday to see that courts do get involved in setting Federal policy. Sometimes the duties of Congress and the duties of the court overlap.

Judge GIGNOUX. We do have two former Congressmen on our rules committees now: Congressman Wiggins and Congressman Rogers, who are active members of the Civil Rules Committee and have been very helpful to that committee and to us. They are aware of Congress perspective on these rules.

You understand that I do not make committee appointments; they are made by the Chief Justice. If there is any indication on the part of this or any other committee that one of your members would like to meet with us——

Mr. MOORHEAD. I do not think anybody volunteered, but I just wondered if that would not have perhaps brought the process to a conclusion a little bit more rapidly.

Judge GIGNOUX. I think it would have helped. I think it would have helped even more, Mr. Congressman, if at that time, staff members of this committee had been part of the process.

Mr. MOORHEAD. My other question refers to your comment on page 6 of your statement where you indicate that a full year has been allowed for public comment, but in response to criticism of the length of time required to effect rule changes, it has been reduced only to meet with criticism that the time for response from the public is too short.

From your experience, what would be an adequate time period for individuals and organizations to formulate their comments?

Judge GIGNOUX. The problem we have there, Congressman, is with organizations such as the American Bar Association. The

American Bar Association Committee which deals with the Federal rules requires time to meet and review a proposed amendment. The committee then must present their recommendation to the house of delegates. As you know, the house of delegates meets twice a year, in August and in January or February. In order to accommodate the ABA schedule, we would have to provide a minimum of 6 months, something between 6 months and 1 year, for comment.

At the other end of the spectrum, we have the problem created by the amount of time which elapses from the submission of a proposal to the Advisory Committee, while it is being reviewed by the reporter, considered by the committee, and goes through the entire process until it is finally enacted. I would estimate some 2½ years are involved.

Ideally, I would say a full year should be allowed for comment. This was the initial thought. The minimum time probably should be 6 months. There have been occasions, however where we have had to shorten the period even further.

We work under certain deadlines; the bankruptcy rules are an example. The advisory committee, chaired by Judge Ruggero Aldisert, and with expert reporters, had to meet a deadline set by the Bankruptcy Act of April 1 of this coming year.

To get through in time, the committee had to complete its work on a truncated schedule.

Mr. MOORHEAD. Thank you very much.

Judge GIGNOUX. Thank you, sir.

Mr. KASTENMEIER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Judge Gignoux, could you spell out a little bit by which Congress deals with the rules promulgated by the Conference and approved by the Court? From your notes, I gather they have to be submitted to Congress during a regular session prior to May 1.

Judge GIGNOUX. Yes; with respect to all these rules, the Chief Justice, on behalf of the Supreme Court, is required to submit the rules proposals to Congress after the start of a regular session and prior to May 1. When submitted, the Chief Justice usually indicates the effective date. The last few times it has been August 1.

The statute provides that the rules become effective automatically on that date unless Congress acts within 90 days—except for evidence rules, it is 180 days.

It has been suggested by the ABA that there should be a uniform period of 180 days; that the 90 days is too short a period of time for Congress, with its very busy agenda, to act. As far as the Rules Committees and the judiciary are concerned, that is a matter for Congress. I see no reason whatsoever not to make it 180 days give Congress time to act.

Have I responded to your question, sir?

Mr. BERMAN. Yes; I gather now there are proposed amendments to the Federal Rules of Civil Procedure which have been promulgated before Congress at this time?

Judge GIGNOUX. No, no.

Mr. BERMAN. No?

Judge GIGNOUX. The Rules Committees have drafted—when this happens in my courthouse, Mr. Chairman, it usually means a fire. I assume it is not true here.

Mr. KASTENMEIER. The bells here mean that a vote is on. We have a few more minutes.

Judge GIGNOUX. Well, just very briefly, the Supreme Court has pending before it at the present time a complete set of bankruptcy rules to provide the procedures under the new Bankruptcy Code, which was enacted in 1978, and which is to become fully effective on April 1, 1984. That is next April 1.

The Supreme Court also has before it a set of proposed amendments to the civil rules and another set of proposed amendments to the criminal rules. The Court must act on these three sets of rules before May 1 of this year or it goes over to another year.

We have no indication and I have no knowledge, needless to say, as to what the Supreme Court has done. It is now April 21. The Court has 10 days in which to act.

May I say, the bankruptcy rules are a complete set of rules. I am holding my hand up here. The volume is about 3 inches thick, with the notes and all.

Mr. BERMAN. I guess we have some legislation that has to be dealt with. We have some thick legislation on the subject as well.

Judge GIGNOUX. Right. And may I add, while we are discussing the bankruptcy rules, we have been advised by the reporter for the advisory committee, Prof. Lawrence King, that whatever Congress does with the Bankruptcy Code to clear up the Marathon Pipeline problem, only technical editorial-type changes will be required in the rules which have been proposed.

We had anticipated that Congress would have acted by this time. Of course, it has not. If Congress acts while the rules are before it, we will ask leave to submit directly to the Congress our recommendations as to these technical changes.

Mr. BERMAN. Perhaps I could ask the chairman first. As a matter of course, do the subcommittees in judiciary that have jurisdiction over the Rules of Criminal Procedure, the Rules of Civil Procedure, set hearings——

Mr. KASTENMEIER. Yes; customarily they are referred to the Judiciary Committee, assigned to the appropriate subcommittee, and are dealt with within the timeframe. Sometimes they become very contentious, as I think the Rules of Evidence did, within the committee.

I am not sure what we will do on bankruptcy rules and other rules. We have not always reviewed them critically with substantial change. Sometimes we have more or less approved them pro forma.

Mr. BERMAN. Well, I guess if we do nothing, we approve them. That is the way the system works.

Mr. KASTENMEIER. Presently they go to Mr. Conyers' subcommittee, I am told.

Mr. BERMAN. Let us say here is a proposed amendment to a specific rule that a majority of his subcommittee and a majority of the Judiciary Committee did not like. Is a bill introduced or is it the form of a resolution——

Mr. KASTENMEIER. The form of a bill.

Mr. BERMAN. The form of a bill that amends the rule or just simply rejects the proposed amendment?

Mr. KASTENMEIER. It can do either, as a matter of fact. I think it is commonly positively presented as an option.

Mr. BERMAN. My final question is—I assume you are familiar with the proposed amendments that I guess are now before the Supreme Court.

Judge GIGNOUX. Very.

Mr. BERMAN. The reason——

Judge GIGNOUX. I do not have them here with me, but I——

Mr. BERMAN. I was totally unaware of this process and that Congress had a role in the Federal Rules of Civil Procedure, but I received a letter from two professors at the USC Law School just a few days ago, strongly objecting to proposed amendments to rule 16 of the Federal rules regarding judicial management of cases, very concerned that without any demonstrated evidence this will particularly help on moving cases quicker or saving judicial time that the chances of active judicial participation, the early stages of litigation will increase the potential for prejudice and fly in the face of a judge distancing himself from contact with the case before the issues are before him in a trial or discovery motion or one of the other pretrial procedures.

I was wondering if you could react to their contention. One of the people who wrote me apparently wrote a Law Review article in the December issue of the Harvard Law Review on this, and the other one is a very distinguished former justice of the Court of Appeals in California, not a Federal judge—Bob Thompson.

Judge GIGNOUX. Thompson. And the professor?

Mr. BERMAN. Judith Resnik. Yes; this may not be for this, it may be more appropriate for the subcommittee——

Judge GIGNOUX. May I say this. The rule 16 amendment which was proposed is a complete revision of rule 16, is the pretrial rule, which had not been modified since 1938.

As you read the present rule, it just has no meaning. It sets out very little that is helpful. The effort of the advisory committee—and a great deal of study was given to this, with the assistance of its reporter, Prof. Arthur Miller—was to draft a rule which would incorporate the case management procedures involving early control of a case, which experienced Federal district judges have been utilizing with great success. Empirically it has been proven that when a judge—in the proposed rule the judge may use the assistance of a magistrate—takes control of a case at the start, that case will move. If a case just lies idle on the calendar, it does not move, 2, 3, 4, 5 years go by without action.

The proposed rule is detailed. In substance it provides that the judge, or the magistrate if authorized by the judge, within, I believe it is now 120 days of the filing of the complaint—and please do not hold me to the precise language; I do not have the rule before me—shall enter a scheduling order which specifies the times within which various procedural steps are to be taken.

I understand we have a problem.

Mr. KASTENMEIER. Yes; the Chair must say that we will now need to go to vote on the floor. I invite my colleagues to return. You could remain, Judge Gignoux?

Judge GIGNOUX. Yes; I will remain until this is all over.

Mr. KASTENMEIER. In which case, we will recess for 10 minutes.

Judge GIGNOUX. 10 minutes, fine.

[Recess.]

Mr. KASTENMEIER. The committee will come to order, following that recess. When the committee was in the process of recessing, the gentleman from California, Mr. Berman, was questioning Judge Gignoux, the witness.

Has the gentleman from California concluded his questioning?

Mr. BERMAN. One final question, Judge, or maybe it is just a completion of your answer. I do not know if you had an opportunity to look at that letter.

Judge GIGNOUX. I am afraid not, Congressman.

Mr. BERMAN. OK.

Judge GIGNOUX. Ask the question and maybe I will have a response.

Mr. BERMAN. Well, I will just read maybe the most pertinent paragraph. It was that they wrote, "We are concerned that judges who manage cases may lose their impartiality in their attempts to force settlements upon parties. The proposed rule provides no definitions for judges about what techniques of management are appropriate. The rule does not prohibit ex parte communications and it does not ban the judge who tries to settle the case from presiding at the trial."

Judge GIGNOUX. My immediate response would be that I am not aware of any judge who is conducting pretrial proceedings, which we do constantly now, in a case in which he is going to be sitting, jury-waived, who would discuss settlement, beyond suggesting to counsel, "Why do you not get together and talk this out?"

My own practice is that I refuse to participate in settlement discussions in a court case. In a jury case, if both counsel ask if I can help, I do not have the same problem because the jury is going to make the ultimate decision.

Mr. BERMAN. Do you know whether a jury is going to be requested at the time you start that?

Judge GIGNOUX. Definitely, yes. Under the Federal rules, a request for jury has to be made within 10 days after the last pleading has been filed. By the time we are talking about settling the case, the die is pretty well cast.

Mr. BERMAN. I guess the only question: It sounds like you have—you are senstive to their concerns and conduct yourself accordingly. Should that be in the rule?

Judge GIGNOUX. There is a second problem which I have forgotten that this letter raised.

Mr. BERMAN. Well, it does not prohibit ex parte communications.

Judge GIGNOUX. Ex parte communications between a judge and litigant's counsel are forbidden under our code of ethics.

Mr. BERMAN. It is already covered.

Judge GIGNOUX. I know of no judge who would consider that.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. Judge Gignoux, I have been curious, and now I have somebody I can ask the question of, about the time that the rules of evidence were about to get some congressional action in

1975 or thereabouts, I got appointed to a State prosecutor's job for a couple of years before I came down here. I had spent a lot of time in the Federal courts up until then, but ever since they went into effect, I have not been there. How are they working out?

Judge GIGNOUX. The Federal Evidence Rules?

Mr. SAWYER. Right.

Judge GIGNOUX. Very well indeed. The Federal Judicial Center assembled a conference at Williamsburg two years ago, I believe it was. I was invited to attend. The members present at the conference were academics, trial practitioners and judges who had particular interest in the field of evidence. That group, over a 2-day period, reviewed every rule, and the consensus was that they were working very well indeed.

There were two, three, four, or five problems. There were ambiguities, questions which had resulted in conflicts between the different circuits. The committee for that reason recommended that the evidence committee be reactivated. That recommendation has been approved by the Judicial Conference and the Chief Justice at some point will be reactivating the committee for the purpose of dealing with these questions.

One, for example, is the co-conspirator exception, with which you are probably familiar as a prosecutor. There are some problems there. But on the whole the evidence rules have been working very well. I know that they have been a tremendous help to the Federal judges, and I am sure to practitioners also.

Mr. SAWYER. The bar generally likes them, too.

Judge GIGNOUX. They appear to. They always carry them around, and some even know which rule to refer to.

Mr. SAWYER. I recall some of them appeared like they were quite controversial at the time and I had been practicing long enough that I did not like any controversial changes.

Judge GIGNOUX. The most controversial changes were the privilege rules. As you may recall, Congress cast those aside and the present privilege rule requires the courts in a diversity case to apply the Rule of Privilege of the State in which the court sits, and in a Federal question case, to apply—I cannot remember the precise language—the privilege rule as it has been interpreted by the Federal courts.

Frankly, it would be helpful if we did have in the Federal Evidence Rules, a section on privileges so that we would be uniform throughout the country, but that was very controversial. You were not in the Congress at the time.

Mr. SAWYER. I am sorry to hear, Judge Gignoux, that you are contemplating going senior judge. I trust that does not mean that you are not going to stay active.

Judge GIGNOUX. I am definitely going to stay active. I made the decision a year ago in September—September 23 was my 25th anniversary—my law clerks commissioned a portrait. I took the hint.

Mr. SAWYER. We have done that with the chairman of this committee and he is still here.

[Laughter.]

Judge GIGNOUX. I have assured the Chief Justice that I intend to continue active judicial service. Indeed, a set of chambers are being set up for me, and as long as health permits, I will be active.

Mr. SAWYER. Very good. We are glad we are not going to lose your talent, then.

You know, you may not recall, but you appeared before committees that I was on before, subcommittees, and I met you at Williamsburg and other places. I got sufficiently interested. I read a few of your opinions, which I usually do not undertake to do gratuitously these days, not needing to read them.

I hope you do stay active, and I hope for quite a while.

Judge GIGNOUX. I appreciate that.

Mr. SAWYER. Thank you.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. Just a single question. Actually, maybe two questions.

In the process of reviewing these rules, you outline the role of your own committee, the Standing Committee. To what extent do you have staff or reporter or other professional assistants to aid the Standing Committee?

Judge GIGNOUX. Our staff, Mr. Chairman, is sitting on my left here. Mr. Spaniol has been with the Rules Committees for many years. He has an extraordinary memory and extraordinary ability to attend to detail. He guides us and provides us with necessary background.

We do not have an academic reporter. We do have on the committee. Professor Remington and—the committee consists, as you are aware, Mr. Chairman, of two circuit judges, two district judges, two practicing attorneys and two academics—oh, yes, Prof. Wade McCree. I think of him still as a judge, but of course, he is now a professor.

Our function, frankly, as the standing committee, as I believe I indicated in my oral comments, is not to redraft rules, but to make any technical conforming changes that may be necessary. If there appears to be some serious concern that a member of the committee has concerning a proposed rule, it will be remanded to the Advisory Committee for further study.

The first item on our agenda for our June meeting—and it has been on our agenda for several meetings in the past—is this question of whether we should seek authority to have a full-time or part-time reporter. If the standing committee assumes the responsibility of responding to comments more fully than is the present practice, we will have to very seriously consider a full-time reporter. It would be too great a burden for the reporters of the advisory committees.

Mr. KASTENMEIER. Let me ask you a question in a different area. The resolution of American Bar Association House of Delegates makes a number of recommendations for change. You have discussed one of them, at least in part; that is to say, the openness to the public in the same fashion as congressional hearings and markups. I think you have already responded to that. That is what constitutes your view and that of your colleagues.

They also make the suggestion that minority views may be made available to the standing committee through the Judicial Conference, presumably the Supreme Court and the Congress. How do you feel about that? Should there be minority views, and should they be made available?

Judge GIGNOUX. Having seen the ABA resolution in the Criminal Justice Section report, I have inquired as to whether a minority view had ever been expressed in writing. As far as we can ascertain, it never has been. There is nothing to prevent that.

Today, if any member of an advisory committee or the Standing Committee felt strongly, he would be permitted to submit a minority report. Very possibly, under our present practice, the presence of a minority view may be indicated in the so-called gap report, which has been going forward to the Supreme Court and the Congress for several years. Our present practice, Mr. Chairman, is that after an advisory committee has prepared a draft proposal, the proposal has been circulated for publication in the various services and in pamphlet form, which goes out to 7,000 or 8,000 different individuals, and comments have been received, public hearings have been held, changes have been made, and the Advisory Committee has finally approved a proposed amendment for its transmission to the Standing Committee, the proposed amendment accompanied by a report prepared by the chairman of the advisory committee, which sets forth in summary form the action which the committee has taken with respect to the various comments or proposals which have been submitted to it. That report, the gap report we call it, goes forward to the Judicial Conference, to the Supreme Court, and to the Congress.

If, for example, the Criminal Rules proposals which are presently before the Supreme Court are transmitted to Congress, the transmission will include a comprehensive summary prepared by Judge Walter Hoffman, the chairman of the Advisory Committee on the Criminal Rules, which explains each of the changes made since the original circulation and frequently discloses any differing views.

Did I answer your question? It was a very long answer.

Mr. KASTENMEIER. Well, I do not know whether it does or not. That is a long explanation, but the question, I guess, is should there be minority views, or should they be available. Your answer is they are not forbidden, but the practice is that they are not commonly transmitted, excepting insofar as the discussion may reflect that such differing views were considered along that line.

Judge GIGNOUX. Right.

Mr. KASTENMEIER. I take it that you stand by your present procedure, whatever that is.

Judge GIGNOUX. Under the present practice at an advisory committee meeting I attended where a member of the committee had strong dissenting views, there is nothing which would have precluded him from submitting a minority report. If we prepare a formal set of rules and regulations, which we do not have now, so as to formalize our procedures, I assume that we will indicate that any minority dissenting reports——

Mr. KASTENMEIER. Do you have any feeling about formalized minority reports, that might undercut the authority of the rule itself by presenting it in such fashion as to suggest that there may be two or more opinions about a matter in which only one opinion must, in fact, prevail?

Judge GIGNOUX. I think we would be naive if we were to suggest that either the Supreme Court or Congress might feel that there are not two points of view on most of the proposals we submit. My

answer to your question is that I see no harm in permitting minority reports.

Mr. KASTENMEIER. Should there be a limitation on terms of members of the advisory committees or the standing committee?

Judge GIGNOUX. The Judicial Conference's resolution of 1958, I believe it was, provides for 4-year terms, the appointments to be made by the Chief Justice. His practice, I believe, has been to reappoint for one additional 4-year term, and that is it. Again, if we have formal rules, that will be formalized.

Mr. KASTENMEIER. Do you think that any changes in proposed rules by the Standing Committee could be explained in notes that accompany the rules that are sent, either to the Supreme Court or to Congress?

Judge GIGNOUX. The answer is yes. Again, I wish to emphasize that the changes the Standing Committee has made have almost always been minor technical editorial type changes which perhaps would not require notes.

Mr. KASTENMEIER. That is all the questions I have this morning. I want to thank you, Judge Gignoux. It is always good to see you. I appreciate your testimony. It has been very helpful, very illuminating, and very forthcoming. The committee is indeed indebted to you for your appearance.

Judge GIGNOUX. Thank you, Mr. Chairman. May I say how much we appreciate the opportunity to explain our present process. I will remain available in the event there are any further questions in the course of this hearing.

Mr. KASTENMEIER. That might be helpful. Thank you, sir.

Our next two witnesses will appear as a panel. Representing the American Bar Association will be Mr. James Holderman. Mr. Holderman is chairman of the Rules Enabling Act Committee of the Rules Committee of the Criminal Justice Section.

Mr. Holderman has a long, distinguished legal career, including 6 years as assistant U.S. attorney.

Also joining Mr. Holderman at the witness table will be Mr. Alan Morrison, director of the Public Citizen Litigation Group. Mr. Morrison, like Mr. Holderman, is also a former assistant U.S. attorney. Currently Mr. Morrison is extensively involved in trial and appellate practice involving law performance issues.

Indeed, it is a pleasure to welcome you both, gentlemen. We have copies of your prepared statements and you may proceed as you see fit. Probably at this point, it would be helpful if you could summarize.

I note that, Mr. Morrison, you have an 18-page statement, and Mr. Holderman, a 10-page statement. Who would like to proceed?

Mr. Morrison.

TESTIMONY OF ALAN MORRISON, DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP, AND JAMES HOLDERMAN, CHAIRMAN, SUBCOMMITTEE ON THE RULES ENABLING ACT, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY THOMAS SMITH, ASSISTANT DIRECTOR, CRIMINAL JUSTICE SECTION

Mr. MORRISON. Thank you, Mr. Chairman.

I am honored to be here today. I have already learned a great deal from these hearings as a result of some of the discussion that Judge Gignoux has set forth. I am also pleased to hear that his committee is going to take a serious look into these problems at its next meeting in June.

My full statement is before the committee. I ask that it be inserted in the record. I will only briefly summarize it at this point.

Mr. KASTENMEIER. The statement of Judge Gignoux, the statement of you, Mr. Morrison, and the statement of Mr. Holderman will be received and made part of the record in their entirety.

You may proceed, Mr. Morrison.

Mr. MORRISON. There are two basic areas I want to touch on today.

The first is how we go about deciding what rules should be changed and second, who should make the final decision. As to the first, my basic point is that the process can have greater openness, greater balance and greater responsiveness.

As to the second, I believe that the Supreme Court should no longer promulgate rule changes; that the Judicial Conference of the United States would be an improvement, but not much of one; and that I would prefer to see the Standing Committee on Rules and Practice assume the full responsibility. Let me take each of these issues in turn.

As to the first, there are four separate matters I see regarding the decisional process. The first of these is the matter of the agenda. All of these committees are busy groups. There are a wide number of possible issues that they could take up. On the one hand, they could consider discovery rules. On the other hand, they could consider class action rules. It makes an enormous difference to litigants in which areas they are going to focus their attention.

My suggestion is that each year the standing committee and each of the advisory committees publish some sort of an agenda, after taking comments from the public, to get an idea of where they are focusing their attention, that there would be a regular meeting at which agenda items would be considered, and that it would be published so that everyone, from the bench and the bar and through the Congress, could know what the issues are that are being considered and have an opportunity to comment upon that regularly.

The second point I want to make concerns balanced representation. Here I must take some exception to Judge Gignoux's evaluation. I would say that, while perhaps the representation is balanced in a geographical sense, it is not balanced in a great many other ways that I consider very important.

The committees are particularly heavily weighted in favor of judges, with a smattering of law professors. Practitioners are predominantly from large firms, principally people who represent defendants. There is nothing wrong with defendant's counsel being on these committees, but it seems to me that the problems of plaintiff's counsel are rather different, and they ought to be heard at the rule formulation stage.

Moreover, I notice that many of the members of these committees are senior partners in law firms. Senior partners in law firms may have once had intimate familiarity with the operation of the

rules, but by the time they get to be senior partners they are much less familiar with the day-to-day problems than would other people be who are at different levels in the firm.

I recognize that without making committees enormous in size, they cannot be perfectly diverse. My point is that we can do a better job than we are doing now. If that means increasing the size of the committees—and I can think of only one of the committees that I would think is too large now, and that is the Civil Rules Committee—then that ought to be done.

For that, I would suggest the model that the Congress has already put into effect; that is, it has decreed for advisory committees of Federal executive branch agencies that they contain balanced representation. I would insist upon some sort of requirement for that in any amendments that might be made to the Rules Enabling Act.

The third point I want to express concern about is the lack of openness at meetings. The question of open meetings is a fundamental philosophical question of how bodies such at this ought to operate.

Those on the inside—and I speak of those in the executive branch, and at one time in the legislative branch—prefer to keep meetings closed because it has seemed to work better that way. This was true when the Federal Advisory Committee Act was under consideration and proposals were made to open those meetings. I think it was true for the Government in the Sunshine Act, and it was true when the Congress itself debated opening up its markup sessions several years ago.

It seems to me that those experiences have taught us a fundamental point: That open markups do not significantly interfere with the operation of the committee. There is no reason not to apply that in these committees as well.

Judge Gignoux suggests I believe on page 11 of his prepared testimony that, because the issues are controversial, the presence of outsiders would inhibit discussion. My response would be not to disagree that the issues are controversial, but to underscore the fact that because they are controversial there is more, rather than less reason that the meetings should be open.

Moreover, I would say that these are not the kind of issues which judges, as judges, normally have the right to have in closed meetings. They are, after all, not deciding cases. They are acting in a quasi-legislative capacity, issuing rules of procedure which we all have to deal with in the Federal courts. It seems to me in this matter they are operating quintessentially as a legislative type operation and ought to be subject to the same scrutiny as everyone else.

It seems to me that just as other bodies have learned to operate in the sunshine, so the various committees would learn to operate in the sunshine here as well. I urge the standing committee to amend its practices accordingly and to take that into account.

The fourth point on the general openness question is with regard to the responsiveness to the public. I read in the prepared testimony of Judge Gignoux that there is a list of 7,500 people who regularly received copies of the rules in the drafting stage.

I have submitted comments to the various committees on perhaps four or five occasions over the last 2 or 3 years. For some reason, I am not on that list. I don't know how that happens or how the list is completed. I generally have to find out by reading the advance sheets, looking at U.S. Law Week, or reading the legal publications. Sometimes even that doesn't work. There was a situation a couple of years ago where there were some changes in the appellate rules which upon investigation I determined had not been publicized at all to anyone. So, it wasn't my organization that was left in the dark. It was the entire bench and bar.

Beyond that general problem—because you can often find out what is happening—there is a real problem with having comments submitted in the sense of having them received but not having any action taken on them, except at the very early stages. I learned here today that there is a report—I believe it is called the gap report—which summarizes the various comments and explains why the committees did not accept them, if I understand the testimony correctly.

If that is the case, that obviously would be a very important document. Yet, it has never been made public, to my knowledge. I am sure it would help the Congress in its deliberations, it would help the Supreme Court, and it would help the public as well.

My general impression has been that comments after the initial stage are not taken into account, in part because many of the committees are quite busy. The standing committee, as noted before, does not have its own reporter. That obviously makes it more difficult to take into account public comments, particularly if there are large numbers of them.

It seems to me that if I had to pinpoint one problem that has caused the Congress to have to act both with respect to rule 4 last year and, to greater or lesser degrees, with other rules in the past, it is that the comments which have been made to the committees have neither been taken into account, nor adequately explained to the public when they were not being taken into account. I would urge, if for no other reason—and I believe there are a number of good ones—that Congress, for its own protection, might well insist that the reporters prepare responses that give the public an indication of why the comments are not being accepted.

Finally, I would suggest that the very least that could be done is that when reports are received by the various committees, or sent to the next stage, or comments are solicited, that the Federal Register, published by the Federal Government, could easily be utilized to simply put a notice in, telling people that comments can be submitted and stating where the drafts are available.

On the second question of who should decide, I want to state my assumption as to what I think the Congress means in this regard; that is, the body that does the final signing off should not simply be a rubberstamp. If that is the case, and I believe it is the only sensible view, then I suggest that the Supreme Court ought not to have the responsibility for at least four reasons.

First, the Court is already too busy to give the matter serious attention. We hear almost daily about Supreme Court overload. While upon occasion individual Justices may give a particular rule

attention, the likelihood of the collegial body itself sitting down and really reviewing rules I think is quite remote.

Second, there is no real expertise among Justices of the Supreme Court in the day-to-day operation of the Federal courts. Moreover, they have neither staff nor a reporter to help them out in that regard.

Third, with a fair amount of frequency the rules return to the Supreme Court, where the Court is asked to pass upon them to see whether they are consistent with the Rules Enabling Act, the Rules of Decision Act, and to decide what they mean and whether they are constitutional. To say the least, that presents an awkward situation for a Justice, who has presumably passed on a rule already, to have to come back and review his prior determination to see whether it meets the test of law.

The last reason of course, is that if you believe as I do that there ought to be openness in the rule promulgating process, surely having the Supreme Court open even on this limited matter is a greater intrusion than it would be if other bodies were given the responsibility.

As for the Judicial Conference of the United States, I see many of the same problems as the Supreme Court has and do not recommend that it be given the responsibility. In addition, I would also note that it meets only twice a year and, hence, is not in continuing session, so as to be able to review changes if changes need to be made.

The conference has a wide variety of other tasks and responsibilities, and I would urge this committee not to give the Judicial Conference, instead of the Supreme Court, the final say. There is one consideration raised by Congressman Moorhead who pointed out earlier today that process seems to take a long time.

One reason the process takes a long time is because we have basically four levels: An advisory committee, a standing committee, a Judicial Conference, and the Supreme Court. Various committees meet at different intervals during the year, and the time taken between intervals and the time taken to prepare recommendations up to the next level, plus the deadlines imposed and the statutes, inevitably mean that the more levels of review you have, the longer it is going to take.

While rarely will you have a situation in which there is an emergency matter that needs to be taken care of, less delay after a reasonable opportunity for public input seems to me to be a desirable generally matter.

My own choice would be to have the standing committee, as enlarged, having its members appointed by the Judicial Conference rather than the Chief Justice himself, be the body that would do the actual promulgating of the rules. I think that it should have better balance, and the better balance could also extend to the advisory committees.

It seems to me the two levels of review probably ought to be enough. Then the standing committee would be able to take its job of reviewing the advisory committee recommendations seriously.

I want to add a final word, if I can, about the role of the Congress. Under the present situation, the Congress must pass plenary legislation for any rules changes except the rules of evidence, if it

wishes to either delay or to stop them entirely. In the rules of evidence there is a one-House veto.

I believe that the Congress needs to have the ultimate right to step in in the event of ill-guided rules, but to do so only by statute. I also support the American Bar Association's recommendation that the period be extended to 180 days, given the realities of the current business load of the Congress.

Congress, of course, could within the 180 days pass a statute specifically shortening the time, if there were in fact any genuine emergencies.

I want to be very clear about one final aspect of congressional involvement. I do not mean that Congress should have a legislative veto of any kind. As my prepared statement indicates, I have been litigating the constitutionality of the legislative veto in a number of cases, including one now before the U.S. Supreme Court. In addition to my view that I believe that the statutes containing vetoes are unconstitutional, I am also of the view that they are unwise and not a good use of congressional time.

My own feeling is that if the process at the rules committee levels were improved, made more open, made more responsive, and the members were more balanced in their viewpoints, there would be far less of a need for Congress to be involved at all. My own view is the best way to get Congress out of this is to improve the process before it gets here.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Morrison.

I think we will postpone questions of you until we have Mr. Holderman testify.

[The statement of Mr. Morrison follows:]

PREPARED STATEMENT OF ALAN B. MORRISON, DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP

Mr. Chairman, Members of the Subcommittee, I am pleased to appear here today to discuss the very important subject of improvements in the method by which the Federal Rules of Civil, Criminal, Appellate, and Bankruptcy Procedure, as well as the Rules of Evidence, are currently amended. Before turning to the principal thoughts I have regarding how the rulemaking process can be improved, let me give you a word about my background.

For the past fifteen years, my principal occupation has been as a litigator in the federal courts, first as an Assistant United States Attorney in the Civil Division of the Office of the United States Attorney for the Southern District of New York, and since February, 1972, as Director of the Public Citizen Litigation Group, a public interest law firm which I co-founded with Ralph Nader. In 1978–79 I took a leave of absence from my present position and was a visiting professor at Harvard Law School, where I have returned to teach in the January semester each year since then. Despite my experiences in academia, I make no pretenses about being a scholar, let alone a historian intimately familiar with the Rules Enabling Act of 1934. Indeed, I do not claim to have familiarized myself with all of the writings concerning possible amendments to the rulemaking process. I am, however, a practitioner who offers you today a practitioner's viewpoint about the rules, in particular the civil and appellate rules which I monitor most closely.

While I believe that the Rules as currently in effect are quite satisfactory, particularly when compared with some of the alternative systems that I have occasionally encountered in state courts, I do have some misgivings. In my opinion, two specific aspects of the rulemaking process require Congressional attention and, I believe, should be changed significantly: they are opening up the process to increased public scrutiny and input, and eliminating the authority of the Supreme Court to promulgate rules.

I. INCREASED OPENNESS

Before turning to the specific solutions that I recommend for increasing the openness of the rulemaking process, I must begin with a caveat. Because the process is now so closed, indeed, secretive might be the proper term, I cannot be as certain of some of the facts as I would like since I have not viewed the system from the inside. But with this in mind, let me turn to four specific ways in which I believe that the process could be substantially improved.

A. Opening Up the Agenda

The question of how each of the advisory committees and the standing committee decides what it will consider is a matter on which I have no direct information. As a practitioner, I only know that from time to time notices are issued indicating that a draft rule is being considered and that comments are invited. While I suppose it is theoretically possible for a member of the public to write a letter and suggest a topic, my experience with more specific comments and more definitive proposals, which I describe below, would lead me to believe that it would probably not be a fruitful endeavor.

It's an old adage that he who controls the agenda, controls the debate. Let me give you two examples of subjects for which the decision on whether they will be on the agenda has been of critical importance. The first is discovery. There have been a number of articles written, speeches made, and proclamations uttered about "discovery abuse." Some district courts have restricted the number of interrogatories that can be issued, and other proposals now coming forward would impose significant court controls on the parties in virtually every case at a very early stage. While I have little doubt that there are significant discovery abuses in some very big cases, it is my experience there is no real "discovery problem" in most litigation, other then the fact that trial judges fail to take control when discovery problems are called to their attention. And most of those occur only in the few and often publicized truly mammoth cases. Moreover, most of the discovery proposals, such as those limiting interrogatories or document production requests, would have a disproportionately disadvantageous effect on the less well financed plaintiff's attorney who must use these devices because depositions are far more costly. Moreover, any attempt to cut down on discovery, whatever the rationale, is more likely than not to benefit defendants, who often need less discovery than plaintiffs. Thus, the decision to take up discovery can hardly be viewed as entirely neutral.

The second topic, which to my knowledge the civil rules committee has not yet examined, is that of class actions. Since the Supreme Court ruled in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), that individual notice is required, whenever practicable, in damage class actions, at the expense of the plaintiff, it has been much more difficult to bring those kinds of cases. Because the decision was based entirely on Rule 23, it is obvious that a rule change would have a significant impact on the situation. Yet to my knowledge the committee has not even considered any such rule change, let alone debated its merits. Thus, the failure to even put this on the agenda has had a continuing dampening effect on damage class actions in the federal courts.

All of this is by way of stating the obvious: the decision to work on one topic necessarily precludes focusing on others, particularly given the busy schedule of the reporter and the members of the committee.

The committee's recent efforts to eliminate the U.S. Marshal from the business of serving summonses and complaints is a good example of the ability of important constituents, principally the Justice Department, to influence the agenda of the committee. The Justice Department was interested in making this change, not because Rule 4 was not operating effectively to serve process, but because the Marshal's Service was being overtaxed at a time when the Justice Department was trying to cut its budget. Obviously, other litigants do not have the clout of the Justice Department, which generally has its own representative on the civil rules committee, as well as its enormous imput into the entire federal judicial system.

My proposal is rather modest in this regard: the advisory committee should regularly solicit from the public, principally the bench and bar, suggestions about topics for consideration. Then, at one regular meeting a year, the various topics should be reviewed and a work plan agreed upon which would be made publicly available so that everyone could assess whether the committee was wisely allocating its limited time.

B. Balanced Representation

The present composition of the standing committee and the advisory committees is dominated by judges and by practitioners who are generally from large firms, often occupying very senior positions, and representatives of the Justice Department. (See attached analyses.) This has led, in my view, to a number of instances in which the effects on other practitioners have been overlooked and in which practical considerations of a change have not been adequately considered. Moreover, there are a number of other ways in which more balanced representation would improve the quality of the committees' work and the overall fairness of rule changes suggested.

As noted above, there are obvious differences in perspective between those who represent plaintiffs and those who represent defendants. Similarly, different parts of the country have different practices, making greater geographic diversity helpful. There is also a considerable difference in the nature of practice, even among those in private civil practice in the federal courts, between those who specialize in diversity cases, those who handle federal commercial cases (such as those under the securities and antitrust laws), and those who are in federal courts because the litigation is with a federal, state, or local governmental agency. Even within that relatively narrow spectrum of litigation, the problems with the federal courts are perceived rather differently, and greater effort needs to be made to be sure that the advisory committees contain a balance of those different perspectives.

Several other groups need a voice, among the most prominent being those who may know more about how the rules are really working than anyone else: the clerks of the various courts. In addition, it would probably also be useful, if perhaps only in an advisory capacity, to have representatives from state courts to obtain their perspective based on how other systems are dealing with these questions. In short, what I am suggesting is that the Rules Enabling Act be amended to include a balanced representation requirement for the advisory committees similar to that now imposed by Congress for advisory committees of the executive branch in the Federal Advisory Committee Act, 5 U.S.C. App. I.

C. Open Meetings

The difficulties arising from the absence of a public agenda and the relatively narrow range of viewpoints on the various committees is compounded by the fact that all the committee meetings are closed to the public, except in those rare instances where the advisory committees decide to hold public sessions to receive oral presentations, but not to debate the merits of proposals. Not only are the meetings not open to the public, but their schedules are not announced, and it has been my experience that it takes a real effort to find out when they are being held, what they are going to consider, and to obtain copies of documents that are going to be reviewed or which have been approved. In varying degrees the same is true for the work of the standing committee and the Judicial Conference. Both of those bodies have closed meetings, and while it is always possible to find out when and where they are meeting, that is sometimes all that an outsider can learn.

As this Committee is fully aware, the Congress has long learned to operate its committees in open public sessions, not only to take testimony, but also to mark up legislation. Moreover, in 1974 Congress imposed on all collegial executive branch agencies and independent regulatory commissions the requirement that they meet in the open pursuant to the Government-in-the-Sunshine Act, 5 U.S.C. § 552a. In my view, when changes to federal rules are being considered, those discussions should take place in the sunshine as well. Obviously, if Congress itself were considering rule changes, its meetings would be open, and there is no reason, simply because some members of these committees may be federal judges, why their conduct, in what is the essentially legislative activity of writing procedural laws, should not be subject to full public view. I am sure that opening up meetings of the various committees working on rules changes will not be a popular one with some members of the judicial branch, but that is not a reason for Congress to step away from its responsibilities. Rules are simply too important, and have to great an impact on the public, to be prepared entirely in secret.[1]

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[1] As an aside, I would note for the Committee that I was a member of President Carter's Commission on a National Agenda for the 1980's. Every time, no matter how sensitive the matter being discussed, even during the 1980 election campaign, we met in open session, and never found our discussions inhibited by the presence of others, including on one occasion the First Secretary of the Soviet Embassy who, for reasons that none of us will ever understand, left immediately before the discussion turned to foreign affairs.

Finally, let me give you one example of the extent of secrecy in the rulemaking process. Several years ago I was startled to learn that the Supreme Court had sent to Congress a change in the rules of appellate procedure under which the district court would, immediately upon the filing of a notice of appeal, transmit the notice to the court of appeals instead of waiting the 40 days allowed to docket the record and send it then. This change was supposedly made as a means of enabling the courts of appeals to gain control over the case at an earlier stage, but whether it achieved that end is a matter of no great moment for these purposes.

It did have two definite consequences, neither of which, I feel sure, was intended. The first was to require all appellants (except the federal government) to pay not only the $5 fee for filing a notice of appeal, but also the $65 fee for docking the appeal, which would normally not be payable for another 40 days. This meant not only the speeding up of an expense, but an unnecessary expenditure in the fairly common situation in which the decision not to appeal (or to settle the case) would not be reached until after a notice of appeal is due, but before the added 40 days had run. While surely not a cosmic matter, it is one about which organizations such as ours do have some concern.

Second, changing the rules produced an increase in the number of appeals that the statistics show each year. In the first year, in fact, there was a double increase because there was an additional jamming up in one year of the equivalent of thirteen months' appeals due to the compression of prior appeals that had not yet been docketed. The result, not often noted by analysts, was an "increase" in the number of appeals due to a change in the rules.

But even beyond the first year, the new system produces a far greater number of appeals because of the large number of cases in which an appellant will file a notice of appeal and decide for one reason or another not to go forward. This is particularly true for the government, where any appeal must be approved by the Solicitor General, who, in my experience, is rarely able to make that decision within even the 60 days that is allowed to file a notice of appeal. The result is that the government almost always files a notice of appeal, and then withdraws the appeal if the Solicitor General does not authorize it to be prosecuted. Thus, as a result of a rule change intended to gain control over the appellate docket, there has been an increase in the business of the courts of appeals, perhaps to the point where additional judges will be said to be needed because of it.

What startled me was not the substance of the rule change, but that I had never seen it mentioned in any publication, including United States Law Week, the federal advance sheets, the ABA Journal, or any of the legal newspapers. After doing some checking, I discovered that the matter had been the subject of public comment, but only if one were fortunate enough to be on a list of addressees prepared by the applellate advisory committee. While perhaps this particular amendment was not of great significance, the proper time and manner to make that assessment is by allowing the public (broadly defined) to comment before the change is proposed, rather than after the Supreme Court approves it.

Secrecy breeds another problem. With regard to the changes in what papers must be filed pursuant to Rule 5(d) of the federal rules of civil procedure, a proposal was made several years ago to eliminate the filing of discovery materials. When this was objected to by a great many people, including most vehemently the press, the proposal was withdrawn by the advisory committee. Subsequently, unbeknownst to the public, the proposal, albeit in somewhat modified form, was reinstated, but the public only became aware of it when the Supreme Court transmitted the rule change in final form to Congress. As a result, the change caused considerable concern in the Congress, which had to devote a significant amount of time to the matter. All of that could have been avoided if the process were an open one.

D. Handling of Public Comments

In recent years, particularly the civil rules committee with which I am most familiar, has provided notice that it was considering a proposal, and has invited public comment. This opportunity to submit comments is an improvement, but so far as I am able to determine, the submissions do not appear to be read, except those received when an idea is first raised, which do seem to have some effect.

On a number of occasions, I have submitted comments, some substantive and some rather technical, and in no case have they been accepted. What concerns me most is not that my comments are rejected, but that there is never a response made indicating that the committee has considered the comments and decided not to adopt them for some specific reason. Particularly for technical comments, such as those I submitted regarding changes in Rule 4 dealing with service of process, someone needs to evaluate these submissions, not because they are of great significance

in an overall policy way, but because they make sense, eliminate confusion, or make life easier for everyone. My own feeling is that the comments are rarely if ever looked at, and surely no one is giving them the kind of "hard look" that is taken when judges review the actions of administrative agencies.[2]

Part of the problem no doubt stems from the fact that the standing committee does not have a reporter and that the judges and other committee members cannot be expected to evaluate all the comments themselves. Thus, at the very least, the standing committee should have its own reporter to review the materials that are submitted and provide some sifting for the committee to help it determine which comments are important and which are not. Particularly since the standing committee has the power to make changes in an advisory committee's recommendations, it needs the functional capacity to review the comments submitted as well. Since the reporters of the advisory committees are all academics, it would probably be advisable to have a practitioner perform the function for the standing committee to give it a different perspective, especially since at present only two of its members are not either judges or law professors.

The absence of a reporter also handicaps the Judicial Conference of the United States when it reviews the rules after the standing committee and before the Supreme Court finally passes on them. While it is true that the Supreme Court's clerks and other staff can provide some assistance, it is unrealistic to expect persons familiar with the Supreme Court procedure also to be experts in district and appellate court litigation as well. And, as for the Justices' own law clerks, they surely lack the background necessary to provide the kind of practical assistance needed in these areas.[3]

The problem of lack of responsiveness to public comments is compounded by the absence of any dissenting views and the rarity with which there is any explanation of what choices had been rejected and why. Thus, when the proposals come from one level to the next, the members of the higher body must review the matter de novo and discover the problems on their own. And if they fail to perceive them, they will undoubtedly pass them on to the next level. Finally, as noted above, if changes are made, the advisory committee's notes relate to the advisory committee's proposals, and not those ultimately adopted by the Supreme Court.

II. THE ROLE OF THE SUPREME COURT

For a number of years there has been considerable debate about whether the Supreme Court should be in the business of promulgating federal rules. The debate encompasses two different questions. What's wrong with the Supreme Court doing it, and who else would do it in instead? Before responding to each of those, I want to state what I believe to be the underlying premise upon which these questions should be answered: whichever body does the final promulgating of the rules should be something more than a rubber stamp. This means actually reviewing the proposals, and from time to time, making changes in them. Otherwise, there is no reason for adding another layer of review.

As to why the Supreme Court should not issue rules for the courts of appeals and district courts, there are a number of good reasons to get it out of that business. First, as virtually every Justice has publicly stated, the Court is already too busy with its other duties, principally deciding cases, to handle other duties also. Second, most of the Justices have no expertise in the issues being considered, and those who once practiced regularly in the federal courts have long since lost touch with the current issues. Third, the fact that the Court promulgates the rules makes it extraordinarily awkward when cases relating to the construction of the rules, their consistency with the Rules Enabling Act or the Rules of Decision Act, or their constitutionality come before the Justices. Finally, if the Committee agreees that there is value in openness in the rules promulgation process, it will be much more difficult to enforce that standard with the Supreme Court than it will for other bodies.

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[2] When Congress eventually took over Rule 4 for itself, it adopted several of the proposals that I made, but which were not commented on by the Committees that received them.

[3] While the question of the promulgation of the Supreme Court's own rules is not before this Committee, I would note that virtually every objection which I have raised here applies with equal if not greater force to the operation of the Supreme Court. Indeed, in its most recent comprehensive revision in 1980, virtually no one outside the Court knew that it was even considering making these changes, and no one that I am aware of had any input into the amendments. Thus, while some of the changes were significant improvements, in a number of other cases there was confusion and mischief created that later had to be corrected. *See* Morrison, Supreme Court Changes Get Mixed Review, Legal Times of Washington, May 12, 1980 at 21; Bosky and Gressman, *The Supreme Court's 1980 Rules—The First Addendum*, 87 F.R.D. 513 (1981).

Therefore, unless there is no one else to do the job, the Supreme Court ought to be relieved of its rulemaking job as soon as possible.

The question then becomes, who else might do it? Congress long ago recognized that it should not have the continuing duty to promulgate procedural rules and I see no reason to reconsider that decision. Nor should Congress review the rules under any kind of legislative veto mechanism.[4] However, as I suggest below, it is appropriate to retain a reasonable waiting period before any rule becomes effective.

One body which has been suggested as a possible candidate for the rules promulgating function is the Judicial Conference of the United States. In my view it suffers from many of the same difficulties as the Supreme Court, and in fact has some other problems that make it an equally unattractive option. The Conference, which is composed of chief judges from all of the federal circuits, a district judge from each, and two bankruptcy judges (28 U.S.C. Sec. 331), meets twice a year for two days, during which it receives and discusses upwards of twenty reports from its committees and others at each meeting. Thus, it is apparent that the Conference could not devote any significant amount of time to reviewing the rules and hope to reach its other business. Indeed, because it is not a body continuously in session, unlike the Supreme Court, it may even be less effective in reviewing matters of this kind should it encounter a problem and need to spend some time reconsidering it.

Furthermore, the chief judges of the circuits are already burdened with a large number of duties beyond that of the ordinary federal judge, and this further reduces the likelihood that they will be able to devote any significant time to reviewing the rule changes. And because a person becomes a chief judge through seniority, this also makes them more remote than other members of the judiciary from the problems of actual federal court practice. Finally, as appellate judges, they are less in touch with the day-to-day running of a trial court, which is the focus of most of the rules.

Even on the issue of openness, while the problem for the Judicial Conference is perhaps less severe than it is for the Supreme Court, open meetings would still meet enormous resistance, as evidenced by the vehement opposition the Conference put forth several years ago when Senator Dennis DeConcini proposed to open most meetings of the Judicial Conference to the public, including the sessions in which rules changes were discussed. Thus, I see little advantage in making a change if the change is simply to move the decision making from the Supreme Court to the Judicial Conference.

In my view, the Standing Committee on Rules of Practice and Procedure is the most appropriate body to have the statutory authority to issue rules. If the committee were given that authority, its members should be appointed by the Judicial Conference for staggered terms of perhaps three years, with a two term limit. While the Conference would not have any authority to review individual rule changes, the committee would be expected to report to it on a regular basis, and the Conference would have substantial input into the agenda and matters such as the selection of the chairs of the advisory committees.

If such a change were made, it should be accompanied by the reconstituting and enlarging of the advisory committees, which should probably include at least one member of the standing committee on each. However, the bulk of the members of the advisory committees would not serve on the standing committee, but would rather be a broad based group that would do the basic work on the rule changes. As I envision it, the function of the standing committee would be to check and review the proposals made in light of the public comments and to serve as a coordinator between the various committees to see that their work is not inconsistent. I also urge Congress to provide a budget for adequate staff for both the standing and the advisory committees.

Finally, while I am strongly opposed to a legislative veto provision, I believe it would nonetheless be wise to continue to have an automatic stay of effectiveness for a period of at least 180 days before any rule changes went into effect. This would give the Congress a reasonable opportunity to review any proposals and to make suggestions or in extreme cases to pass overriding legislation. In my view, the opening up of the process, together with the broadening of the committees, should serve to eliminate much of the need that Congress has felt in recent years to become embroiled, directly or indirectly, in reviewing rules changes. My own feeling is that

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[4] Quite apart from the questions of practicality and good government, I believe that the veto is unconstitutional in all respects. In that connection I should note for the record that I am counsel of record in all three currently pending cases challenging the constitutionality of the veto, including *Immigration and Naturalization Service* v. *Chadha*, No. 80-1832, which I anticipate will be decided by the Supreme Court before the end of June.

Congress has far more important things to do than that, and that once it establishes a better procedure than now exists, the process could be left on its own, subject to ultimate review by the Supreme Court for constitutionality and statutory consistency.

I want to thank the Committee for this opportunity to appear today on this most important subject, and I am more than willing to offer my services to assist the Committee in any way that I can in bringing about these very important changes.

ANALYSIS OF RULES COMMITTEE

(As Constituted on August 1, 1982)

Committee on Rules of Practice and Procedure (8 members): 4 Judges (2 District, 2 Circuit); 2 Professors (includes one former Circuit Judge); and 2 Practitioners (large firms).

Advisory Committee on Appellate Rules (8 members): 5 Judges (5 Circuit, 1 Int'l Trade Court); 1 Solicitor General (former professor); and 2 Practitioners (large firms).

Advisory Committee on Bankruptcy Rules (13 members): 8 Judges (1 Circuit, 2 District, 5 Bankruptcy); 1 Professor; and 4 Practitioners (3 large firms, 1 firm specializing in bankruptcy).

Advisory Committee on Civil Rules (15 members): 6 Judges (2 Circuit, 4 District); 1 Professor (former Assistant Attorney General); 2 Present/immediate past Justice Department (Civil); and 6 Practitioners (4 large firms, including 2 former members of Congress, 2 medium size, corporate firms).

Advisory Committee on Criminal Rules (12 members): 7 Judges (1 Circuit, 6 District); 1 Assistant Attorney General (Criminal); 4 Practitioners (1 large firm, 2 small firms, including former AAG (Criminal), 1 public defender).

Mr. KASTENMEIER. Mr. Holderman, we are very pleased to have you here.

Mr. HOLDERMAN. Thank you, Mr. Chairman.

Distinguished members of the subcommittee, my name is James Holderman, and I am here on behalf of the 300,000 lawyers and judges of the American Bar Association. We thank you for the opportunity to present our views before you today.

I would like to acknowledge at the outset the presence of Mr. Tom Smith, Esq., who is the assistant director of the criminal justice section of the ABA and has done a very able job with regard to this rulemaking issue that is before you and you are considering.

I consider this to be somewhat of a historic event. It has been, as has been noted earlier today, quite some time since Congress has taken an intense look or extensive look at the rules enabling process.

I think that perhaps the American Bar Association, although we don't want to take the entire credit, had something to do with the impact here today. Certainly Judge Gignoux has acknowledged that the Judicial Conference is going to consider the ABA policy proposals.

I would commend to you the ABA policy that was adopted by the House of Delegates in February 1982. It is appendix A to my written statement. It really is a blueprint of what the American Bar Association believes to be areas of concern, areas that perhaps Congress should consider with regard to the Rules Enabling Act.

I would like to start at the bottom, if I might, and just talk briefly about the fourth provision, which deals with uniformity with regard to the procedural and evidentiary rules.

It seems to me that there appears to be some unanimity among those of us who are appearing before you today that creating a uniform time period, creating uniform procedures within the Congress

as to how the procedural and evidentiary rules are going to be dealt with would be helpful. I think that would alleviate some of the problems that have come up in the past, and I believe that that proposal is something that warrants consideration.

Moving up to the top of the House of Delegates policy, in the first provision, which is the delegation of the rulemaking authority by Congress to the Judicial Conference of the United States, in reality that is the way it is now.

Although, Mr. Chairman, you stated at the outset that perhaps some people viewed this proposal or this policy by the ABA as requesting drastic changes, that certainly is not one of them. At this point, that is exactly the way things are done.

The Supreme Court really doesn't have the time to devote to these procedural rules nor really, to some extent—and I hate to say this—the expertise because they haven't been on the firing line, they haven't been in the district courts, they haven't been involved in the discovery process or the civil procedure or criminal procedural processes. Their staffs, their law clerks really do not have the practical experience I think it takes.

The ABA states that the Judicial Conference is the proper party for delegation. Likewise, the Judicial Conference has a ready staff, has the available facilities to take on this burden since they have been carrying it on for some time.

Moving on to the second provision of the resolution, which is the advisory committees to the judicial process, it is the policy of the American Bar Association that these be broadly representative, that the committee members be appointed for a specified period of time, and that there be staggered terms so that there be continuity on the committees.

Judge Gignoux has talked about the creation and then the ending of the Rules Advisory Committee on the rules of evidence. It seems to me that these committees should have a continuing function and not be committees that can be created or dissipated really when there appears to be no further concern.

Moving to the third point of the policy of the ABA, which I think may be the one that perhaps is the most controversial, which is the openness policy. It is the policy of the ABA to promote openness in six ways:

By publishing the procedures by which the Judicial Conference and its committees conduct its rulemaking process. There are procedures, but those of us who are members of the public or practicing practitioners, they are unavailable to us.

By also publishing and circulating and, to some extent, in recent years there has been substantial improvement in this area. The draft rules, in order to allow and promote comment from the public.

The third point is holding public hearings. In February 1982—as a matter of fact, the same month that this policy was adopted—the Criminal Rules Advisory Committee did hold public hearings with regard to the rules of criminal procedure.

I believe they were held in three cities across the country. I know I testified at the hearings held in Chicago. The hearings were conducted for an entire day. Several members of prosecutors' offices, defense lawyers, judges and law professors appeared before

those committees. I don't know if without those public hearings there would have been the type of input there was with regard to those rules. That is one of the reasons why the ABA policy requests and asks for the holding of public hearings.

Likewise, point No. 4 would be the maintaining of minutes by the Judicial Conference and their committees. These don't have to be verbatim transcripts, such as being prepared here today, but at least minutes, so that there could be a statement of what took place and how decisions were arrived at.

Likewise, regarding the opening of the meetings to the public, the ABA policy in my written statement reflects an acknowledgement that on some occasions it may not be in the best interest of drafting to have all meetings open, but certainly some of the meetings should be opened to the extent that there can be public observation, if not participation, in the rulemaking process in order to effectuate the policy of public awareness of the process.

Likewise, the sixth and last point is to allow for minority reports so that the differing views, which obviously do exist, can be aired and can be known to the public.

I thank you.

[The statement of Mr. Holderman follows:]

PREPARED STATEMENT OF JAMES F. HOLDERMAN, ESQ., CHAIRPERSON, SUBCOMMITTEE ON THE RULES ENABLING ACT, CRIMINAL JUSTICE SECTION ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, my name is James F. Holderman. I am an attorney engaged in the private practice of law in Chicago, Illinois. I appear before you today on behalf of the 300,000 lawyers and judges of the American Bar Association to present to you the Association's views on the Rules Enabling Act. The Association's position on the Act is contained in a policy adopted by the ABA House of Delegates in February 1982. During this past year, I chaired a subcommittee of the ABA Criminal Justice Section's Rules Committee that examined effective ways of implementing this policy.

I would like to thank you for the opportunity to appear at this hearing. I believe that it is a very important, and perhaps even historic, occasion. It can properly be characterized as "historic" because it has been many years since the Congress has taken a comprehensive look at the judicial rule-making process. These hearings have long been needed. You are to be commended for recognizing that need and convening this hearing.

The need for Congressional hearings on this subject stems from the purpose they can serve. At a minimum, they will clarify and create a public record about the procedures and mechanics of the judicial rule-making process. They will highlight any areas of uncertainty about how that process operates. They will also reveal any existing confusion concerning areas of controversy surrounding the process. This controversy concerns not only the procedures through which judicial rule-making is conducted, but also extends to certain fundamental legal principles that are related to the process, such as the doctrine of separation of powers.

Before discussing the specific aspects of the judicial rule-making process, a brief overview of the history of federal judicial rule-making may be helpful. First, it is important to recognize that making the rules for federal court proceedings is a power of the Congress. That principle was recognized very early by the Supreme Court in *Wayman* v. *Southard*, 23 U.S. 1 (1825).

However, almost from the beginning, Congress delegated judicial rule-making authority to the courts. The earliest example of this delegation is found in Section 17 of the Judiciary Act of 1789. Through this provision of the Act the federal courts were authorize to establish their own rules. The Process Act of 1789, as subsequently amended in 1792 and 1793, also helped establish the tradition of judicial rule-making being exercised by the courts through a delegation of authority from the Congress. A series of subsequent Acts of Congress vested in the courts authority to prepare judicial rules to govern various proceedings, such as those involving admiralty, bankruptcy, criminal cases, and equity matters.

In 1934, Congress authorized the Supreme Court to draft civil rules. These rules were approved in 1938, obviating the need for rules in equity, since actions at law and equity were merged by the civil rules. In later years, the Supreme Court also acted on the basis of statutes passed by Congress to bring about modern rules of criminal procedures, appellate procedures and evidence.

In 1956, the Congress created the Judicial Conference of the United States. In 1958, it gave the Judicial Conference the responsibility of studying the operation and effect of the general rules of practice and procedure and recommend changes and additions to those rules. Congress saw this as a means of providing the Supreme Court with "advice and assistance" on these matters.

Acting pursuant to this authority, the Judicial Conference now plays a major role in the judicial rule-making process. In fact, some observers have noted that the Supreme Court appears to have relinquished any first-hand participation in judicial rule-making and currently exercises only nominal authority in the process. It routinely receives the recommendations of the Judicial Conference concerning rule changes, and in a pro forma manner passes them on to Congress.

A couple of experiences prompted the American Bar Association to take an interest in the federal rule-making process. In 1979, Chief Justice Burger addressed the Association about the increasing work load of the judiciary. He stated that this increasing work load presents an important ". . . need to examine the powers exercised by the judiciary." He pointed out that often the judiciary is criticized for ". . . exercising powers not assigned to it by the Constitution." Although these remarks were not a direct call to examine the judicial rule-making process, the Chief Justice made specific reference to this need in his 1981 Year-End Report. Therein he stated, "In light of the Supreme Court Justices' evermounting burdens, it remains uncertain whether the Justices should set aside the time and effort required to examine proposed rules affecting the federal court system. I have suggested on earlier occasions that the rule-approving role of the Supreme Court—whose members are much busier now than they were when the procedures were established over forty years ago—merits examination."

The Association became even more keenly interested in the judicial rulemaking process through its involvement with the consideration of what was to become Rule 26.2 of the Federal Rules of Criminal Procedure. The ABA House of Delegates adopted a policy placing the Association on record in opposition to this proposed Rule. In promoting that policy, first-hand experience was gained about the judicial rule-making process and its procedures.

As a result of that experience, the ABA Criminal Justice Section undertook a study of federal judicial rule-making. At the same time, the ABA Special Committee on Coordination of Federal Judicial Improvements also was engaged in an independent study of this subject. The reports of these two entities were completed at approximately the same time. The similarities in their recommendations was striking. As a result of these reports, the ABA House of Delegates adopted a policy in February, 1982 that was based on the report of the Criminal Justice Section, but which nevertheless incorporated the salient features of both reports. I would like to share with you our recommendations.

The American Bar Association recommends that the Congress take the necessary action to formally provide for judicial rule-making authority to be delegated to the Judicial Conference of the United States. The decision to adopt this concept as Association policy involved a two-step process.

The threshold determination that had to be made was whether the rule-making process should be shifted from the Supreme Court to some other body. The conclusion that this change would be a sound decision was based on a number of factors. First, to the extent that it could be determined, it appears as though the Supreme Court presently only participates in the rule-making process in a nominal way. It seemed logical that the applicable statutes be amended to reflect the prevailing rule-making practice as it is actually conducted. Secondly, this would be a way of decreasing the responsibilities of the overburdened Supreme Court without impairing judicial efficiency or the rights of litigants. Thirdly, it would resolve a long-standing controversy over the propriety of the Court passing on cases that involve challenges to rules that the Justices have previously approved. If rules were drafted and approved independent of the Court's participation, decisions on issues involving those rules that subsequently manifest themselves in cases before the Court would take on a greater appearance of objectivity and impartiality.

Having decided that there exists cogent reasons for shifting the judicial rule-making authority, consideration had to be given to the question of what body should be the recipient of this responsibility. Several alternative proposals have traditionally been advanced. These usually either suggest that the Judicial Conference of the

United States be delegated rule-making authority or that some newly created commission be vested with this authority.

The American Bar Association supports vesting this authority in the Judicial Conference. The Association supports this approach for a number of reasons. First, the Judicial Conference has been exercising this authority for twenty-five years. During this time it had done an admirable job. Furthermore, it already has the administrative structure to continue this function. In addition, it has the research and staff capability of the Administrative Office of the United States Courts and the Federal Judicial Center to assist it in effectively and efficiently carrying out this function. Finally, this approach supports Standard 1.30 of the ABA Standards Relating to Court Organization. That Standard states, "Authority to formulate rules of procedure for all types of matters and proceedings in the courts should be vested in the court system. . ." The complete text of this Standard and its accompanying Commentary are attached. (See appendix "C".)

Proponents of vesting judicial rule-making in a newly created independent commission see this type of structure as fostering a high degree of independence on the part of the rule-promulgating authority. They stress the need for removing the process from the influence of judges and the Chief Justice, who presides over the Judicial Conference and appoints its committees.

The Association believes that it is not necessary to remove rule-making authority from the Judicial Conference in order to obtain a desirable degree of independence. We believe that the necessary independence can be achieved through prescribing certain membership criteria for the rule-drafting committees operating under the auspices of the Judicial Conference. After all, the rule-drafting stage is perhaps the most critical stage of the process at which fundamental decisions are made. To this end, the Association's policy has urged that the Advisory Committees conducting the rule-drafting be "broadly representative of all segments of the legal profession," and that the members serve staggered terms during which the membership is gradually rotated. Persons should be eligible to be reappointed to a consecutive term only once. This method is seen as constantly bringing persons with new ideas and perspectives to serve on the rule-drafting committees.

The American Bar Association policy also contains a number of recommendations intended to promote "openness" in the judicial rule-making process. Creating an atmosphere of "openness" is important in shaping the public's perception of the judiciary as an institution of our government. The public's belief that there is a need for openness for all institutions of government was heightened by the "Watergate" incidents. So many of the proceedings that surrounded that incident occurred in an air of secrecy that the public became naturally suspicious of any proceeding conducted outside the view of the public. In the public's eyes, the judiciary was the symbol of fairness in the "Watergate" incidents. For the judiciary to have compelled disclosure in so many instances in those cases, and yet to foreclose the public's access to its own rule-making proceedings has the potential of doing some violence to the public's image of our judicial system.

Some of the ABA recommendations on openness have already been implemented to some degree or another by the Judicial Conference. We urge Congress to review these recommendations in light of the present practice of the Judicial Conference and decide whether these recommended procedures should be formalized in some way by statutory mandate. The details specified by the statute might vary, depending on the findings of Congress and its judgment as to the degree of particulars required. A brief discussion of the procedures recommended to the ABA may serve to raise some of the issues that should be considered in making a decision on whether a statutory mandate to implement them is warranted.

The Association policy calls for the publication of the procedures by which the Judicial Conference and its Advisory Committees conduct the judicial rule-making process. These procedures have never been published. In part, it is hoped that these hearings will help shed some light on these procedures.

Publication of the procedures outlining how the rule-making process is carried out and how the relevant judicial conference committee conduct their proceedings would contribute to formalizing the process. Published procedures would also be of great assistance to interested persons who want to observe or provide their views on prospective rule changes. They would help to clearly delineate for these persons the opportunities that they have for making a contribution to the drafting of proposed rules.

The Judicial Conference currently publishes draft rules and circulates them to interested members of the bar and the bench. Although this achieves a certain degree of dissemination, the ABA policy suggests that a greater degree of access to proposed amendments could be achieved if they were published in appropriate publica-

tions that are circulated to persons and organizations likely to be interested in draft rules.

The policy makes no suggestions as to what might be appropriate publications. However, the Federal Register might be viewed as one possible candidate. Other likely sources are the various bar journals and legally oriented newspapers. In lieu of publishing the complete rules amendments, consideration might be given to widely publishing notice of their availability.

The Association policy supports the judicial rule-making authority holding public hearings on proposed Rule changes. In 1982, the Committee on Rules of Practice and Procedure of the Judicial Conference held public hearings on proposed amendments to the Federal Rules of Criminal Procedure. The ABA participated by sending a representative to the hearings to present its views on the proposed amendments.

Public hearings have the advantage of allowing a dialogue between committee members and witnesses that appear before them. In addition, they serve the important function of enhancing the appearance of "openness." Although the hearing may not provide vast amounts of information that is not otherwise available or could be provided through written comments, it is vital that the public perceive that the courts adhere to a policy of openness and is receptive to suggestions set forth in an open forum.

In addition to holding public hearings on proposed rule changes, it is important that meetings at which final reports are received and action is taken also be open to the public. Certainly there are times during the rule-drafting process when business must be carried out without the presence of "outside" individuals. As a practical matter, a certain amount of private discussions and negotiations must take place to enable the committee to launch a proposal. Public observation is not critical at this stage and will not materially add to the deliberations. In fact, it may have an inhibiting influence. The drafting committee must feel free to "float" proposals, frankly discuss them, and take appropriate action. Undoubtedly many ideas are considered at this stage that never become "serious" proposals, and therefore have no potential of having an impact on the bench, the bar, and other interested persons.

It is not expected that the presence of the public at meetings where reports are received and final action is taken will have any significant impact on the decisions that are made. However, this is not its main purpose. It is intended to serve the important function of dispelling the negative connotations that attach to any governmental decision that is made "behind closed doors." Open meetings also permit the public to be privy to discussions that are dispositive of proposed amendments.

The ABA sees the maintenance of minutes by the rule-making authority to be an important practice that should be instituted. This does not necessarily mean that a verbatim record or transcript need be kept. However, the minutes should be sufficiently detailed to give an accurate and useful account of the principal points raised and the business discussed and transacted.

Minutes would also be particularly helpful in early stages of the rule drafting process when the proceedings would presumably be closed to the public. Of course, it is important that the minutes then be available to the public. In the past, there has been some criticism that any reporters' notes and minutes that are taken are unavailable to the public and are not transcribed unless a member of a Judicial Conference committee requests a transcription.

Finally, we suggest that a procedure be instituted to provide for filing minority reports expressing dissenting views to concepts incorporated into proposed rule changes. The minority views would be helpful in highlighting areas of disagreement and thereby preserve a record of positions that were considered and rejected. They would be of assistance to persons doing research on the rules and could become an important tool for court interpretation of decisions made by the Judicial Conference on rule changes. Furthermore, if broadly representative committees are formed, there may become an increasing need for minority opinions, as decisions on rule changes become less homogenized.

Our policy also contains recommendations as to the role of Congress in the judicial rule-making process. That policy supports the continued review of proposed rules by Congress. Furthermore, it states that Congress should have the opportunity to amend proposed rules.

The ABA policy suggests certain limitations be made to this process of Congressional review and amendment. The review period should be for a period of 180 calendar days. This time period should be permitted to be extended by Congress only once. A limitation on extending the time for review is suggested so that Congress cannot indefinitely continue to delay the effective date of rule amendments. Unless

Congress acts within the permitted time (or a reasonable extension thereof), the amendments should take effect.

The policy also specifies that the amendments by Congress to proposed rules that are submitted to it should be accomplished by legislation approved by both Houses. Presently, in the case of the Federal Rules of Evidence, either House is empowered to disapproved a proposed rule by passing a resolution. This unilateral authority to disapprove a proposed rule is tantamount to a one-House amendment to delete an entire rule.

The Association policy also asks that Congress take a look at all aspects of the procedures surrounding the submission of judicial rules to Congress and the procedures for their review and approval. In many instances these procedures lack uniformity. Presently, there is no uniformity as to: (1) what rules are submitted to Congress, (2) the time when they are required to be submitted, (3) the manner in which Congress may effect changes or reject rules, and (4) the time provided for Congressional review.

There appears to be no reason for the variation in the procedures that apply to various types of rules. The only explanation seems to be that the "Rules Enabling Act" is actually a series of statutory provisions that have been enacted in a piecemeal fashion over a period of years. No comprehensive revision of the Act has been undertaken to reconcile meaningless incongruities. We commend this to you as a matter that this Subcommittee might consider undertaking.

For the convenience of the Subcommittee, the Criminal Justice Section has prepared a chart to judicial rules. The chart is included in a document prepared by the ABA Criminal Justice Section Rules Committee as a guide to some practical considerations in enacting legislation to implement the ABA policy on the Rules Enabling Act. This document and the Association's policy are appended to this statement for the Subcommitte's consideration.

I again thank you for the opportunity to appear and present the American Bar Association's views on this important subject. I would welcome the opportunity to answer any questions that the Subcommittee might care to ask.

ABA Policy - Approved by the ABA House of Delegates (February 1982)

Criminal Justice

Report No. 118B

The Section's second recommendation (Report No. 118B) was amended by the Section, supported by the Special Committee on Coordination of Federal Judicial Improvements which withdrew its own recommendation (see page 3) on the same subject, and then approved by voice vote. As approved, it reads:

Be It Resolved, That the American Bar Association supports changes in the relevant statutes and procedures applicable to the process of adopting rules of evidence and procedure for use in the federal courts to be in conformity with the following principles:

I. The delegation of rule-making authority should be granted by Congress to the Judicial Conference of the United States.

II. The Advisory Committees of the Judicial Conference that perform rule drafting functions should be broadly representative of all segments of the legal profession, including judges, prosecutors, defense lawyers, legislators, law professors, and other lawyers who participate in a meaningful way in the area which is affected by the rules under consideration. The members of these Advisory Committees should be appointed for a term of a specified period of time. At the expiration of the term, the members should be eligible to be reappointed to a consecutive term only once. The expiration of the members' terms should be staggered, so that the membership of the committees is gradually rotated.

III. The Judicial Conference and its Committees should promote openness in the rule-making process and the procedures utilized in this process by:

A. Publishing the procedures by which the Judicial Conference and its Committees conduct the rule-making process.

B. Publishing, as early as possible, copies of draft rules and also any major changes that have been made to previously published draft rules. They should be published in appropriate publications circulated to persons likely to be interested in the draft rules and also distributed to persons and organizations who are likely to have an interest in the draft rules.

C. Holding public hearings on all draft rules and also on major changes that have been made to previously published draft rules. These public hearings should be announced in advance by notice in appropriate publications within a sufficient time prior to the hearing. The notice should solicit public comment on the proposed rules and invite interested persons to appear and testify at the public hearing.

D. Maintaining minutes of their proceedings. These minutes should be available to all interested persons.

E. Opening to the public meetings when final reports on proposed rules are received, and action is taken on these reports.

F. Permitting members to file minority reports in disagreement with the final report that is adopted. Minority reports should be appended to the final report that is adopted.

IV. Proposed rules should be submitted to Congress by the Judicial Conference so that Congress may review them and have an opportunity to amend them, if desired, prior to their taking effect. This review process should be uniform for all rules and provide at least 180 calendar days for Congress to engage in a meaningful review period once, for a specified limited number of days. Proposed rules should take effect unless they are disapproved or amended through legislation within the 180 day time period, or an extended period of review.

American Bar Association

March 9, 1983

David W. Beier, II
Counsel
Subcommittee on Courts
House Judiciary Committee
Room 2137-B
Rayburn House Office Building
Washington, DC 20515

Dear David:

Enclosed is a "position paper" on the Rules Enabling Act that was approved by the ABA Criminal Justice Section Council at its February 5-6, 1983 meeting.

The opinions expressed in this document are not at variance with the American Bar Association policy on the Rules Enabling Act that was approved in February 1982. Instead, it attempts to "fill in the gaps" created by the broad 1982 policy by suggesting practical concerns and viable solutions that should be applied to conform the federal judicial rule-making process to the ABA policy. In effect, the document proposes to give some guidance in choosing between available alternatives to implement the ABA policy, such as whether a particular point raised by the policy is more amenable to resolution through legislative action or an administrative remedy.

You may want to particularly take note of the chart on page 6. It details the divergent procedures specified by the applicable federal statutes that are applied in the federal judicial rule-making process for various types of rules.

I hope this document is of assistance in the Subcommittee's deliberations on the Rules Enabling Act.

Regards,

Thomas C. Smith
Assistant Director

TCS/cr

Encl.

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Appendix B.—Practical Considerations in Enacting Legislation To Implement the ABA Policy on the Rules Enabling Act

CRIMINAL JUSTICE SECTION ADVISORY OPINION

ANATOMY OF THE ELEMENTS OF LEGISLATION TO AMEND THE RULES ENABLING ACT IN CONFORMITY WITH THE FEBRUARY 1982 AMERICAN BAR ASSOCIATION POLICY

INTRODUCTION

The American Bar Association House of Delegates approved a policy pertaining to the federal "Rules Enabling Act" at the 1982 Midyear Meeting (see Report No. 118B). This policy made certain recommendations for changes in the procedures by which rules are adopted for the federal courts.

Although this policy is fairly detailed, certain aspects of it leave considerable latitude in deciding how the principles and suggested changes espoused by the policy should be implemented. The policy did not specifically endorse Congressional action as the preferred way of bringing about all the changes necessary to implement the policy. In fact, it recognized that the recommended principles could be brought about through changes to "statutes" (requiring Congressional action) and "procedures" (which could be accomplished by judicial administrative action).

The purpose of this document is to provide to Congress and the judicial branch the view of the ABA Criminal Justice Section as to the practical manner in which the ABA policy on the Rules Enabling Act should be implemented. It provides the Section's suggestions on what legislation Congress would be required to enact in order to implement the ABA policy. It also provides guidance and some discussion related to discretionary areas where it may not be necessary to enact legislation in order to bring about the implementation of the policy. These are areas where the policy may best be implemented through granting to the judicial branch the latitude to bring about the desired result through administrative action on its part. It is with this purpose in mind, that the following four parts to the ABA policy of February 1982 on the Rules Enabling Act are discussed.

I. *Delegation of Rules-Making Authority to the Judicial Conference*

The Report that accompanied the ABA's 1982 policy on the Rules Enabling Act indicated that rule-making authority for the federal courts is nominally vested in the Supreme Court (see generally 28 USC 2071), but is in reality exercised by the Judicial Conference of the United States. The formal transfer of this authority to the Judicial Conference would have to be provided by a statute passed by Congress.

Legal scholars have agreed that delegation of this authority could be accomplished by Congress without encountering any constitutional impediments. However, the issue of the delegation of judicial rule-making authority by Congress is a matter on which it would be advisible for Congress to hold hearings in order to show that Congress gave this issue and the attendant ramifications and legal concerns consideration. Hearings that address this issue would also preserve a record indicating Congress' intent in making this change in judicial rule-making authority.

The legislation that would transfer judicial rule-making authority could be cast in a number of ways, and still comport with the purpose and intent of the ABA policy. The most direct way would simply be for Congress to strip the Supreme Court of its rule-making authority through the repeal of 28 USC 2071 and enacting appropriate amendments to related provisions of the United States Code (e.g. 28 USC 2072, 28 USC 2076, and 18 USC 3771 and 3772).

However, it is the view of the Criminal Justice Section that although this would be the most direct and expedient method to bring about a transfer in the rule-making authority, it would not be the most desirable method of accomplishing this purpose. The Section recommends that a transfer of the rule-making authority to the Judicial Conference of the United States be accomplished by Congress acting in concert with the Supreme Court. In order to bring about this result, Congress should enact legislation that would amend 28 USC 2071 and the other related provisions to state that the Supreme Court may divest itself of rule-making authority by passing an order delegating these duties to the Judicial Conference. At the same time, consideration should be given to making collateral and conforming amendments to 28 USC 331 to provide for the Judicial Conference to receive the rule-making authority at the time it is delegated by the Supreme Court.

The enactment of this legislation would have several advantages over the wholesale stripping from the Supreme Court of judicial rule-making authority. First, it would be a signal from Congress to the Supreme Court that the formal transfer of this authority is sanctioned by Congress. Second, it would give the Supreme Court time an "invitation" to give the formal transfer of rule-making authority serious consideration. Third, it would give the Supreme Court and the Judicial Conference the time to make the transfer at their own pace, enabling appropriate preparations to be made for a smooth transition. Fourth, it would be the manner that would be least likely to cause friction and controversy between the Congress and the Supreme Court and would avoid a potential dispute over Congress invading the Court's sphere on matters best left to the Court.

The scope and character of the rules that may properly be the subject of "rule-making" by the Judicial Conference is an issue that should not elude Congress in considering any legislation that would provide for delegating "rule-making" authority to the Judicial Conference. Care should be taken that the Committee reviewing this type of legislation understands the full import of the authority that is being delegated. A clear distinction should be recognized between rule-making authority over subject matter that is "procedural" in nature and that which contains materials governing "substantive" rights, or could reasonably be construed as being such. In effect, care should be taken to preserve the principle expressed in 28 USC 2072 which states "...rules shall not abridge, enlarge or modify any substantive rights..." This is an important issue and inadvertent and poorly chosen statutory language should not be permitted to obscure the Congress' intent on the controversial matter of the extent and nature of rule-making authority that is delegated.

II. Composition and Term of "Advisory Committee" Members

The ABA's February 1982 policy on the Rules Enabling Act calls for the "Advisory Committees" of the Judicial Conference that perform rule drafting functions to be broadly representative of the legal profession and to be appointed for limited terms and that the membership be periodically changed by virtue of persons holding tenure for staggered terms.

The "Advisory Committees" of the Judicial Conference are not created by statute. They are internal entities of the Judicial Conference that have been administratively created to assist the Conference in discharging its statutory mandate. Since its creation, these duties have increased and now include a number of functions in addition to the long standing duty to "...carry on a continuous study of the operation and effect of the general rules of practice and procedure..." and to recommend to the Supreme Court "(s)uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay..." (see 28 USC 331).

In furtherance of this purpose, the "Advisory Committees" do the yoeman's work necessary in drafting rules. In a true sense, they are "subcommittees" of the Judicial Conference's Committee on Rules of Practice and Procedure.

Since judicial rule-making is the province of Congress, it would seem encumbent that it take a more intense interest in the process by which these rules are drafted than it has heretofore displayed. In recent years, the rule drafting process and mechanics have not attracted a great deal of Congressional interest. Instead, Congress has been more concerned with the end result, and has used its authority to review rules as a check on the process. It has concerned itself more with the product rather than improving the process that produces the product. The most notable example is Congress' complete rewriting of the Rules of Evidence in 1973.

It is the view of the Criminal Justice Section that the Judicial Conference's Advisory Committees performing rule drafting functions operate in a competent manner. In revising the Rules Enabling Act, Congress should not meddle extensively with these Committees and their manner of appointment. However, Congress may want to pass some cosmetic amendment to 28 USC 331 to give pro forma recognition to the existence of these Committees and sanction their creation by the Conference.

In addition, some "fine tuning" should be accomplished through amendments to complement provisions that would authorize the Supreme Court to delegate the judicial rule-making authority to the Judicial Conference. These amendments would measures concerning the membership of the rule-drafting body. The amendments would be warranted because it is not enough for Congress to permit the rule-making authority to be delegated, and then blandly divorce itself from the mechanics of the process.

The ABA policy makes suggestions with regard to the composition of the Advisory Committees and the length of time that persons serve on them. It is the position of the Criminal Justice Section that Congress should address the policy's expressed concern over the need for broad representation by enacting general legislation that would generally specify the interests from the legal profession that should be represented on this committee. The ABA policy provides examples of the interests that would be appropriate. At the same time, it would be proper for Congress to provide for the membership of this committee to change from time to time through specifying a scheme of rotating terms expiring at staggered intervals.

III. Procedures to Promote Openness in the Judicial Rule-Making Process

The ABA's policy lists six ways in which greater awareness and participation in the judiical rule-making should be promoted. The methods enumerated relate to keeping and making public records that pertain to the rule-making process, and the opening of the deliberations on rule changes to interested persons.

In bringing about these changes, it may be wise for Congress to make general provisions pertaining to them and permit the specific details to be provided through administrative action of the Judicial Conference. Although important, most of the items mentioned in this portion of the ABA policy are housekeeping measures intended to bring about a measure of openness.

During the 97th Congress, Senator DeConcini (D-AZ) sponsored S.111 (see attached) which dealt with openness in Judicial Conference proceedings generally. A substantial portion of that bill concerned rule-making procedures.

The bill provided for meetings related to the rules of "practice or procedure" (it did not mention rules of evidence) to be open to public observation (see Sec. 335(a)(1) - lines 2 through 9 on page 2 of the bill). It also provided for public notice to be given of these meetings and for public comment to be solicited (see Sec. 335(b)(1) and (2) - lines 17 through 26 on page 2 of the bill).

Although S.111 was more comprehensive and inclusive than the subject matter embraced by the ABA policy on the rule-making process, it provides a model for future bills on this subject. A few practical suggestions, however, may be helpful.

At the early and formative stages of the rule-drafting process, there may be a need for the drafting committee to work without the presence of "outside" individuals. As a practical matter, a certain amount of private discussions and negotiations must take place to enable the committee to launch a proposal. Public observation is not critical at this stage and will not materially add to the deliberations. In fact, it may have an inhibiting influence. The drafting committee must feel free to "float" proposals, frankly discuss them, and take appropriate action. Undoubtedly many ideas are considered at this stage that never become "serious" proposals and therefore have no potential of having an impact on the bench, the bar, and other interested persons.

Furthermore, if the drafting committee is broadly representative, as suggested by the ABA policy, many of the oversights that can possibly take place at this stage of the process will have been eliminated or at least checked. This is yet another factor that mitigates against the need for public scrutiny at the very early stages of the rule-drafting process.

The ABA policy only requires openness of the proceedings when final reports on proposed rules are received and action is taken on these reports. Although the presence of interested persons at this stage of the proceedings can be expected to have little impact on the decisions that are made, it does serve the important function of dispelling the negative connotations that attach to any governmental decision that is made "behind closed doors."

In recent years, great progress has been made in opening all stages of governmental deliberations to the public. The Congress, as well as State and local governments, have enacted numerous "sunshine" Acts and information disclosure Acts such as the Freedom of Information Act. The public has come to expect "openness" and equates access to meetings of governmental bodies with "fair play." If there is any branch of government from which the public expects "fairness," it is the judiciary.

The public's notion of fairness was largely shaped in recent years by the "Watergate" incidents. So many of the proceedings that surrounded that incident

occurred in an air of secrecy that the public became naturally suspicious of any proceeding that bears some semblance of being conducted outside the view of the public. In the public's eyes, the judiciary was the symbol of "fairness" in the "Watergate" incident. For the judiciary to have compelled disclosure in so many instances in that case, and yet to foreclose public access to its own rule-making proceedings does some violence to the public's notion of "fairness."

Public hearings to receive oral testimony and comments are important. These hearings permit a dialogue between interested persons and committee members. It facilitates an exchange of ideas and views concerning proposed rules. Furthermore, it has the psychological effect of making interested persons feel that they are a part of the process and that their views are welcome. It is much preferable to impersonal submissions of written statements, without the benefit of a hearing. During February of 1982, a series of public hearings were held at various sites throughout the country by the Advisory Committee on the Federal Rules of Criminal Procedure concerning proposed rule changes. This marked the first instance that public hearings were held by an Advisory Committee.

The rule-drafting process should be more formalized. To this end, rules should be promulgated that outline how the committees conduct their proceedings. The scope of their authority and purpose should be outlined in these rules. To date, committees of the Judicial Conference have not operated under any set of formally adopted rules. They have functioned through adhering to common practices and policies that have been established through custom and usage. If there is to be greater public participation and observation of their activities, rules must be established to govern them and put the public on notice as to what is expected.

The keeping of minutes would also serve several useful purposes. However, the minutes would have to be given the status of public documents in order for the full utility of them to be realized.

Interested persons would be able to glean from the minutes discussion and action taken on matters about which they are concerned, even though they were unable to attend the meeting. Legal scholars would find them useful for research purposes. Attorneys would be able to use the minutes in discerning the contemplated meaning and application of rules bearing special significance to their case.

Some consideration should be given to how extensive the minutes should be. It would probably be sufficient for drafting committees to keep abbreviated minutes that merely summarize the action they have taken. However, when more binding decisions are made at the full Committee level and by the entire Judicial Conference, it would be more appropriate to keep a verbatim transcript of the meetings.

In addition to minutes, minority reports should also play an important part in developing a comprehensive record on the rule-making process. The need for minority opinions should become greater if the drafting-committees are made more broadly representative of the legal profession. They will provide a vehicle through which divergent points of view can be articulated. In addition, they will become an important tool for court interpretation of the decisions made by the Judicial Conference on rule changes.

IV. Approval of Rules by Congress

The ABA would like to see all judicial rules submitted to Congress and approved through the same procedure. Presently, there is no uniformity as to: (1) what rules are submitted to Congress, (2) the time when they are required to be submitted, (3) the manner in which Congress may effect changes or reject rules, and (4) the time provided for Congressional review. In addition to these incongruent provisions the statute is silent on Congress' authority to extend the time limit set by statute for its review of proposed rules. In the absence of statutory authorization to extend the period of review, Congress has operated under a procedure where it enacts a bill providing for an extended period to review the proposed rules that it has under consideration. This procedure is based on Congress' inherent authority to enact laws. Bills extending the period of review therefore act as limited amendments to the statute specifying the period of review and suspend or change the period of review provided by statute as it applies to the proposed rules that Congress has under consideration.

In order to demonstrate the lack of uniformity with which proposed rules are treated when reviewed by Congress, the following chart has been prepared:

Type of Rule	Required to be reported to Congress?	Designated time when required to be reported to Congress	Manner in which changes to proposed rules are effected by Congress	Time provided for Congressional Review	Effective date of proposed rules	Manner of extending Congressional review period & deferring effective date of proposed rules
Civil Procedure (28 USC 2072)	YES	"Beginning" (not later than May 1) of a regular session of Congress.	Not specified by statute.	90 days	Rules are effective 90 days after being "reported" to Congress	None specified by statute. Traditionally extended through enactment of a bill providing for an extended period of review.
Criminal Procedure						
1. Prior to Verdict (18 USC 3771)	YES	"Beginning" (not later than May 1) of a regular session of Congress.	Not specified by statute. Traditionally amendments are made to proposed rules through enactment of a bill (e.g. see Sec. 2(a) of Pub. L. 95-78, 91 Stat. 319).	90 days	Rules are effective 90 days after being "reported" to Congress	None specified by statute. Traditionally extended through enactment of a bill providing for an extended period of review. (e.g., see 90 Stat. 822).
2. after Verdict and Appeal (18 USC 3772)	NO	Not Applicable	Not Applicable	Not Applicable	Prescribed by Supreme Court	Not Applicable
Evidence (18 USC 2076)	YES	"Beginning" (not later than May 1) of a regular session of Congress.	Either House of Congress may disapprove a proposed rule by passing a resolution.	180 days	Rules are effective 180 days after being "reported" to Congress	Effective date may be deferred by either House of Congress, thus extending the Congressional review period.
Magistrate Proceedings (18 USC 3402)	NO	Not Applicable	Not Applicable	Not Applicable	Prescribed by Supreme Court	Not Applicable
Bankruptcy (28 USC 2073)	YES	"Beginning" (not later than May 1) of a regular session of Congress.	Not specified by statute.	90 days	Rules are effective 90 days after being "reported" to Congress	None specified by statute.

In most cases, there is no rational basis for the variation in the Congressional review procedures and requirements. The variation exists only because provisions related to differing types of rules were enacted at different times and no consideration was given to making the procedure uniform. The time has come to abolish these meaningless distinctions.

In resolving these conflicting provisions, the ABA policy expresses a preference for certain of them. For example, it states that the review period should be set at 180 days. This period was selected because it was thought to be a sufficient period during which Congress could give the rules meaningful scrutiny.

Mindful that this review period may not in all cases be sufficient, the ABA policy proposes that Congress specifically set out its authority to extend this period of review. However, it states that Congress should limit itself to extending this period of review only once for any particular set of rules that are "reported" to it for review.

If proposed rules are to be disapproved or amended, it should be done through a bill enacted by both Houses of Congress. The ABA policy does not sanction unilateral action by only on House of Congress in preventing rules from becoming effective. The adoption of such a procedure would raise serious questions as to whether it would constitute a "legislative veto."

The following "Report" accompanied the the proposed Recommondation of the Criminal Justice Section to the ABA House of Delegates. This Recommendation was approved as ABA "policy," with certain modifications first being made to paragraph IV. The "Report" does not constitute ABA policy, however it serves to explain and provide supporting commentary to the policy.

REPORT

Scope of Recommendation

The Recommendation that is the subject of this report makes three proposals on matters pertaining to the Rules Enabling Act. The first advocates that the judicial rule-making responsibility that is currently exercised in a nominal manner by the Supreme Court of the United States be vested in the Judicial Conference. The Judicial Conference is the organization that does, in fact, now exercise this function. Secondly, the Recommendation articulates some fundamental concepts that would infuse the judicial rule-making process with procedural principles permitting greater participation by members of the legal profession. These concepts include measures to bring about broad representation on the advisory committees of the Judicial Conference that exercise rule drafting responsibilities, and procedures to assure openness in the consideration of the rules by the Judicial Conference and its committees. Finally, it speaks to the role of Congress in federal judicial rule-making.

These three proposals do not address all issues that legal scholars have raised concerning the Rules Enabling Act and the general principles of judicial rule-making. They only seek to present a position on some matters that raise procedural concerns about the way in which judicial rules are drafted and adopted for the federal courts.

The question of the scope of matters that may properly be the subject of judicial rule-making is not considered by this report. It should be noted, however, that the commentary to Standards 1.30 and 1.31 of the ABA Standards Relating to Court Organization speak to the dicotomy of authority between the legislature and the courts over "procedural" matters and "substantive" rights. The Congress has also spoken to this issue by enacting an affirmative prohibition that states "...rules shall not abridge, enlarge or modify an substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."[1] It has also declared that a rule of court having the effect of making an "...amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress."[2]

Delegation of Federal Judicial Rule-making to the Judicial Conference

The rulemaking authority for federal courts rests ultimately with the Congress. This fact was recognized early in our nation's history. Mr. Chief Justice John Marshall writing in the case of Wayman v. Southard, 23 U.S. (10 Wheat.) 1 at 41-42 (1825) "...seemed to view the courts' rulemaking power as descending by specific delegation from Congress rather than deriving from an independent judicial authority to formulate procedural rules."[3] More recently, the Court declared in Sibbach v. Wilson & Co., 312 U.S. 1 at 9-10 (1941),

> "Congress has undoubted power to regulate the practice and procedure of federal courts and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."

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1. 28 USC §2072

2. Id.

3. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905 at 927 (1976)

Congress has exercised this power by delegating its rulemaking authority to the Supreme Court through the enactment of 28 USC §2071 (General Rule-making Power), §2072 (Power to prescribe rules in civil actions), §2075 (Bankruptcy rules), and §2076 (Rules of Evidence). The Supreme Court has been delegated the authority to make rules in criminal cases and proceedings by 18 USC §§3771 and 3772.

In practice, the Supreme Court does not take an active part in the drafting of court rules. It has given this responsibility to the Judicial Conference of the United States. In 1958 the Judicial Conference was given the responsibility by Congress to "carry on a continuous study of the operation and effect of the general rules of practice and procedure...prescribed by the Supreme Court for the other courts..." "..(C)hanges in and additions to those rules...deemed desirable...shall be recommended by the Conference...to the Supreme Court for its consideration and adoption, modification or rejection..." (See 28 USC §331).

A Senate Report noted, "The proposed legislation does not change the responsibility of the Supreme Court for prescribing rules of practice and procedure in Federal courts nor the responsibility for submitting some of them for congressional review. It does, however, by statute, permit the Supreme Court to secure the advice and assistance of an existing group which is uniquely qualified to give advice on these matters."[4] The reality of the practice, however, has meant that the Supreme Court does not now prescribe the rules and only exercises nominal authority in judicial rule making for the federal courts.

Questions have been raised as to the propriety of delegating to the Court even this nominal authority. The manner in which that authority is in practice carried out has also been a source of controversy.

The arguments against continuing the present practice of delegating rule-making authority to the Supreme Court include the following:

1. "In 1944 Justice Frankfurter opposed the adoption of the Federal Rules of Criminal Procedure on the ground that the Supreme Court would be unable to evaluate them effectively in view of its distance from the realities of day-to-day district court trial proceedings."[5] (See Rules of Criminal Procedure, Order, 323 U.S. 822 (1944) (memorandum of Frankfurter, J.)

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4. Senate Report No. 1744, 85th Cong., 2d. Sess., reprinted in 1958 U.S. Code Cong. & Ad. News 3023, 3024

5. Weinstein, supra note 3 at 934

2. Justice Frankfurter also..."believed that it was undesirable for the Court to appear, through the issuance of rules, to prejudge issues that might come before it in litigation."[6] (See Rules of Criminal Procedure, Order, 323 U.S. 821, 822 (1944).

3. "The secrecy which normally enshouds the deliberations of the Supreme Court has given rise to another objection to its role in rulemaking. The legitimacy of rules, like that of any legislation, stems in large part from public access to the reasoning of the decision-makers; the Court's secrecy poses a threat to this legitimacy."[7]

4. "...(D)angers posed by congressional criticism of Court-made rules. Such criticism creates an unnecessary conflict between the Court and Congress and reduces the Court's prestige and reputation for unbiased independence."[8]

Recognizing that these criticisms may have some validity and being cognizant of the fact that the Supreme Court does not in reality directly exercise the rule-making authority it has been granted, the question arises as to who should exercise this authority. Scholars have proposed several alternatives.

The most logical alternative on the federal level is for Congress to formally designate the Judicial Conference of the United States as the rulemaking body. This is the alternative that is proffered by the Recommendation that is the subject of this Report. It is a logical choice. The Judicial Conference is, in fact, already exercising this function. It is experienced in these matters and has demonstrated its ability to discharge its responsibilities in an effective manner. Furthermore, the use of the Judicial Conference as the rule-making body conforms with the mandate of §1.30 of the American Bar Association Standards Relating to Court Organization. That Standard provides, "Authority to formulate rules of procedure for all types of matters and proceedings in the courts should be vested in the court system..."

The designation of the Judicial Conference as the rule-making body for the federal courts will not only preserve the judiciary's participation in the development of its own rules, but will minimize the contention that federal courts too readily accept the legal sufficiency of court

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6. Id.

7. Id. at 936

8. Id.

rules and demonstrate a reluctance to strike down these rules of court because they have been promulgated by the Supreme Court. The case of Hanna v. Plumer, 380 U.S. 460 (1965) is often cited as evidence of this judicial reluctance to find fault with court rules. Therein, it was stated "...the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[9]

One of the other possible alternatives would be "an independent commission created by Congress with members chosen by leaders of the legislative and the judicial branches of government."[10] This alternative was not chosen to be included in the Recommendation because it does not conform to ABA Standards and because of the concern that "...if Congress were to participate in the original drafting it might become too committed to a draft to exercise its power of review impartially."[11]

Advisory Committees of the Judicial Conference

Paragraph II of the Recommendation that is the subject of this Report provides that Committees of the Judicial Conference that perform the rule drafting function should have a membership broadly representative of the segments of the legal profession, including judges, practitioners, law professors, legislators, and others which are affected by the rules under consideration. This proposal is made to assure the direct participation of members of the bench and the bar in the rule drafting process. It supports Section 1.30 of the ABA Standards Relating to Court Organization which provides, "The authority to promulgate rules of procedure may be vested in...a rule-making committee composed of judges, lawyers, legal scholars and representatives of the legislature." It also addresses a concern that the present "advisory committees" to the Rules Committee of the Judicial Conference do not currently provide the broad representation that is desirable. In addition to providing this broad representation, consideration should also be given to creating a membership that reflects minority groups that are increasingly joining the ranks of the legal profession.

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9. 380 U.S. 460 at 471

10. Lesnick, The Federal Rule-Making Process: A Time for Re-examination, 61 A.B.A.J. 579 at 582 (1975)

11. Weinstein, supra note 3 at 941

This paragraph of the Recommendation also provides that the members of the advisory committees exercising rule drafting responsibilities should be appointed for a term of limited duration. In addition, it is suggested that the members' terms should be staggered to permit a rotation of the committees' membership. In this manner, the drafting committees would benefit from a regular change of membership that would inject new ideas and insight into the rule drafting process.

To some extent, this rotation of membership in conjunction with the broadly representative nature of the membership, would act to ameliorate the circumstances that have resulted in the observation that the committees are affected by a dominating influence that the present system gives to the Chief Justice.

The Judicial Conference is chaired by the Chief Justice. Its membership includes the chief judges of the eleven circuits, the Court of Claims, and the Court of Customs and Patent Appeals. In addition, a district judge from each of the eleven circuits is elected by the federal judges in the circuit to serve as a member of the Conference. In addition to chairing the Conference, the Chief Justice exercises authority over the rulemaking procedures of the Conference by appointing the members of the Conference's Committee on Rules of Practice and Procedure. It is this Committee, and the advisory committees of this Committee (also appointed by the Chief Justice), that draft the rules. It is probably a fair observation that, "(a)s a practical matter, there is now strong psychological pressure on individual advisory committee members to modify the rules as they think the Chief Justice would wish."[12] Ultimately, the Committee on Rules reports to the Judicial Conference, which is chaired by the Chief Justice; and the Judicial Conference then reports rule changes to the Supreme Court, which is also presided over by the Chief Justice. Paragraph II of the Recommendation is intended to minimize these criticisms by modifying the conditions that give rise to their applicability to the rule drafting Committees.

Openness in the Federal Judicial Rule-making Process

Paragraph III of the Recommendation that is the subject of this Report calls for openness in the federal judicial rule-making process. It enumerates a number of specific proposals to promote a more open and accessible process. These proposals are borne mainly out of the perceived flaws in the present process.

At the present time, although the Judicial Conference is responsible for formulating the rules of court, it has not "seen fit to publish procedural rules or even an informal statement describing its procedures."[13]

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12. Id. at 941

13. Lesnick, supra note 7 at 580

Therefore, the procedure by which rules are proposed has never been formalized, and any description of that procedure is a recitation of the customary practice. By publishing its procedures, and the procedures of its Committees, the rule-making organization "...would enhance the awareness of interested persons and thereby facilitate their participation; it also would find itself required to face explicitly the question whether its procedures now provide adequate means for obtaining a broad range of input."[14]

The publication of draft rules as early as possible in the drafting stage is essential to permit outside groups to review the proposed rules and provide meaningful comment to them. Furthermore, when substantial changes are made to these draft rules, interested groups should be notified so that they can also provide comment on these changes. This notification requirement is in conformity with Section 1.31 of the ABA Standards Relating to Court Organization. That Standard provides, in part, "The authority (to prescribe rules) should be exercised through a procedure that involves use of advisory committees from the bar, notice to (emphasis added) and opportunity on the part of members of appropriate legislative committees, and the bar to suggest, review, and make recommendations concerning proposed rules."

Public hearings should also be an integral part of the rule-making process. In the past, although an opportunity may have been given for written comments to be submitted, no public hearings to receive oral testimony were heldby either the advisory committee, the Committee on Rules of Practice and Procedure, the Judicial Conference, or the Supreme Court. Although it is the practice that written comments that are submitted are available for public inspection, this is not a satisfactory substitute for making a free and open public hearing available to the public.

Published minutes of the deliberations of the Committees engaged in rule-making proceedings would also promote openness and be an aid to persons interested in the formulation of the rules. At the present time, the proceedings of the advisory committees are recorded. However, these recordings are not usually transcribed; and even if they are transcribed, they are not available to the public.

The meetings of the Committees participating in the rule-making process should be open to the public at critical stages of the decision-making process. This does not mean that the public needs to be privy to all the deliberations undertaken. Indeed, there is more than adequate reasons why a body formulating rules may want to have closed meetings during certain initial formative stages of their proceedings. However, at a point where the decision-making process becomes more determinative and decisive, the public ought to be permitted to be present. This

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14. Id.

concept is in keeping with the recommendation of Senator Ervin that "full sessions, 'when it receives committee reports and takes action on them, be open to the public and the press."[15] (See The Independence of Federal Judges, Hearing Before the Subcommittee on Separation of Powers, Senate Committee on the Judiciary, 91st Congress, 2d Sess., at 312 (1970)).

Senator Ervin has also suggested that minority reports be prepared. This would serve the purpose of alerting "...interested lawyer and legislators that matters of controversy are being resolved."[16] Currently, there is no means of determining what issues were in controversy among committee members or members of the conference when particular rules were being considered.

The Role of Congress in Federal Judicial Rule-Making

Paragraph IV of the Recommendation that is the subject of this Report maintains that Congress should retain authority to review and amend rules prior to their taking effect. Presently, Congress exercises authority to review most rules. Only procedure-after-verdict rules adopted pursuant to USC §3772 are not submitted to Congress for review.

"(T)he practice of submitting proposed court rules for congressional approval or modification seems altogether appropriate; such a process conforms to the basic tenets of delegation theory."[17] The participation of Congress in reviewing court rules is in accordance with Section 1.31 of the American Bar Association Standards Relating to Court Organization. This Standard provides that there should be a procedure that involves an "...opportunity on the part of members of appropriate legislative committees, ...to suggest, review, and make recommendations concerning proposed rules." The Commentary to the Standard further states "The legislature...(has) a legitimate concern with procedural policy, and the legislature, as the popularly elected representative of the community as a whole, should have the opportunity to participate in determining what the policy should be."

The Recommendation provides that the review process should be uniform. The provision for uniformity is prompted by the variation in the Congressional review process and the observation that "(t)here is no persuasive reason why all this national rulemaking power should not be

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15. Id.

16. Id.

17. Weinstein, supra note 3 at 927

exercised in the same way and be subject to the same control by Congress."[18]

The time period provided for Congressional review of court rules is one aspect of the process that is not currently uniform. As previously stated, no Congressional review is provided for procedure-after-verdict rules. Rules of Evidence must be reported to Congress not later than the May 1 following the beginning of a regular session of Congress, and take effect 180 days after they have been so reported. Other rules (criminal rules, see 18 USC §3771; civil rules, see USC §2072)) take effect 90 days after they are reported.

The Recommendation specifies a 180 day period of review. The 180 day period is in keeping with the view of Howard Lesnick that "A doubling of the ninety-day period of delay in effectiveness would certainly be warranted..."[19] This suggestion is made because of the inadequate time 90 days provides for meaningful review.

Recognizing that in some cases 180 days may also be inadequate, the Recommendation provides for an extension of this time period. However, the extension may be made only once, and then only for a specified limited period. This extension may be made by either the House of Representatives or the Senate acting unilaterally. The one-time extension for a specified limited period is designed "to prevent delay from being used not merely to permit decision but to embody it."[20]

Another aspect of the present system that lacks uniformity is the manner in which Congress can effect a modification to rules that are submitted for its review. Rules of Evidence may be rejected by a resolution passed by either the House or the Senate; whereas the rejection or modification of procedural rules requires the passage of a bill by Congress and the signature of the President.

This Recommendation provides for disapproval of proposed rules or amendment of these rules by Congress. Such a provision is logical. The purpose of submitting proposed rules and changes to existing rules to Congress is to permit them to review them. If this review is to be

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18. Weinstein, supra note 3 at 939

19. Lesnick, supra note 7 at 583

20. Id.

meaningful, Congress must retain the authority to act in accordance with the findings resulting from the review it conducts.

Respectfully submitted

Sylvia Bacon
Chairperson
Criminal Justice Section

January, 1982

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March 15, 1983

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Dear Mr. Smith,

Thank you for sending me a copy of the ABA's February 1982 policy and of the Criminal Justice Section's Advisory Opinion. I am happy to provide comments as you requested. I fear that they will not be, as you had hoped, "brief."

At the outset, it is important to dispel some confusion evident in the "Report" accompanying the Section's proposed recommendation and in the Advisory Opinion. ABA policy speaks only to supervisory court rulemaking, that is, the formulation of prospective rules for the lower federal courts. 28 U.S.C. §2071, on the other hand, addresses exclusively local court rulemaking, that is, the formulation of prospective rules to govern proceedings in the rulemaking court. You may be interested, however, in 28 U.S.C. §2077(b) (added by the Federal Courts Improvement Act of 1982). Moreover, Judge Weinstein makes a persuasive case that local court rulemaking is, if anything, in worse shape than supervisory court rulemaking. See J. Weinstein, Reform of Court Rule-Making Procedures 117-45 (1977). But, presumably, you are limited by the scope of the policy adopted. If so, references to §2071 should be stricken.

1. It appears that the Chief Justice is himself dubious about the wisdom of continued Supreme Court involvement in supervisory court rulemaking. See Burbank, "The Rules Enabling Act of 1934," 130 U. Pa. L. Rev. 1015, 1021 n.16, 1195-96 (1982).

If the Judicial Conference is indeed the best replacement (but see below), I have no question about the wisdom of the strategy recommended on page 2 of the Advisory Opinion (I note that, in any event, direct legislation repealing §2071 would miss the mark, for the reasons stated above). I doubt, however, whether the legal question of the capacity of the Conference to receive this task - either directly or through sub-delegation - is as clear as the Opinion suggests. In fact, the constitutional context of federal court rulemaking is murky at best. See Burbank, supra, at 1114-21. Hearings, therefore, are important for more than the cosmetic reasons suggested in the Opinion.

Although the ABA's policy does not address limitations on supervisory court rulemaking, the Advisory Opinion states that "[c]are should be taken that the Committee reviewing this type of legislation understands the full import of the authority that is being delegated." The order is a tall one. My research suggests that neither Congress, nor the Civil Rules Advisory Committee nor the Court has ever come to grips with this issue. See Burbank, supra, at 1132-37, 1194. I have also suggested that the Conference, through the Standing Committee, should try to develop standards or guidelines for the Rules Committees and that Congress should stay its hand pending the results of this exercise in self-regulation. Id. at 1195-97. The Advisory Opinion is thus entering uncharted seas - certainly they have not been charted by the ABA policy - and there is a risk that the issues implicated will dominate any congressional inquiry. That may not be a bad thing - although I would argue to the contrary - but it is not a risk to be incurred inadvertently.

Finally, I should record some questions about the wisdom of the ABA policy's choice of the Judicial Conference as rulemaker. You are proposing the substitution of one rubber stamp for another, as the description of the Advisory Committees on page 3 of the Advisory Opinion suggests. The problems, such as they are, lie largely at the lower level. The question of what institution should give final blessing within the judiciary is in part legal (see above regarding the Judicial Conference) and in part prudential. Do the costs of Supreme Court involvement outweigh the benefits? Would the costs (e.g., appearance of prejudgment, friction with Congress) remain the same if changes

were made in the infrastructure of supervisory court rule-making? Would rules promulgated by the Judicial Conference command the same respect both within the federal system and nationally? It is interesting to note that the commission idea advanced by Professor Lesnick (and rejected in the Section's Report) echoes a proposal made by Chief Justice Taft in 1922. See Burbank, supra, at 1070, 1196 n.780. Taft's proposal envisioned Supreme Court approval.

2. There is some irony in, and I expect something to be learned from, the fact that the ABA policy's recommendations regarding Advisory Committees (and procedures) echo criticisms of the pre-1958 committee system. See "The Rule-Making Function and the Judicial Conference of the United States - A Discussion of Rule-Making Under a Plan Soon to be Considered by the Congress of the United States," 21 F.R.D. 117, 130-31 (1957). I see no need for the "cosmetic amendment" recommended on page 3 of the Advisory Opinion, unless of course the "fine tuning" also recommended is undertaken. The latter is, of course, euphemistic. Moreover, legislation of the sort recommended must, if it is to be effective in meeting the concerns stated on pages 6-7 of the Report, create at least a shared appointment power. Notice how close this scheme is to Taft's proposed commission.

All of this is not to say that I agree with the ABA's policy in this aspect. See Hazard, Book Review, 87 Yale L.J. 1284 (1978). The history suggests, however, that if that is the choice, you have underestimated the level of specificity necessary to attain the policy goal.

3. None of the documents you sent me suggests awareness that the Standing Committee is reported to be preparing a statement of rulemaking procedures. See Burbank, supra, at 1021 n.17. My personal preference would be for Congress to await the results of this process before enacting any legislation in the area. Moreover, I am very skeptical regarding your "sunshine" proposals and the rationale advanced to support them. Notice and comment, public hearings and - if it be wise - more representative committees are surely enough to meet any legitimate public accountability concerns. There are risks in assimilating the rulemaking process to the legislative process. One of them is that decision-making in the sunshine will be at best a formality and at worst

Thomas C. Smith March 15, 1983

an exercise in hypocrisy.

Although I agree that public hearings are useful, you are incorrect in asserting that the February 1982 hearings "marked the first instance that public hearings were held by an Advisory Committee." See W. Brown, Federal Rulemaking: Problems and Possibilities 19, 51-53 (Federal Judicial Center 1981). In addition, I doubt whether public minutes should be required. Certainly, as a scholar I found the original Civil Rules Advisory Committee's papers very useful. See Burbank, supra, at 1132-33 n.529. But use by attorneys is a different matter. Indeed, Chief Justice Hughes ordered the official papers of the original committee sealed precisely to prevent the use you apparently advocate. I believe he was right.

4. I agree that the provisions for congressional review in the various enabling acts should be made uniform, and experience since 1973 certainly suggests that 180 days should be preferred to 90 days (as recent one house veto cases suggest that the model of 28 U.S.C. §2076 should not be followed). I am concerned, however, that such a provision, particularly in combination with additional procedural requirements, may make impossible the timely effectiveness of an amendment that is urgently required. Perhaps there should be room, both at the formulation and review stages, for expedited lawmaking.

I hope that these comments are useful.

Sincerely,

Stephen B. Burbank

Stephen B. Burbank

SBB/ec

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MAR 22 1983

Section of Criminal Justice

Standard Oil Company of California
225 Bush Street, San Francisco, CA 94104

Charles B. Renfrew

March 17, 1983

Mr. Thomas C. Smith
Assistant Director
Section of Criminal Justice
American Bar Association
1800 M Street, N.W.
Washington, D.C. 20036-5886

Dear Mr. Smith:

Thank you for your letter of March 8th. I have reviewed the recommendation in the policy adopted by the ABA suggesting certain changes in the relevant statutues and procedures applicable to the process of adopting rules of evidence and procedure for use in the federal courts. I also read with interest the excellent report that accompanied the recommendations submitted by Sylvia Bacon, the Chairperson of the Criminal Justice Section.

I concur wholeheartedly in the recommendations and thought the report was very even-handed and effective in support of the recommendations. I really have nothing to add.

Sincerely,

Charles B. Renfrew

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MAR 28 1983

Section of Criminal Justice

UNIVERSITY OF VIRGINIA
CHARLOTTESVILLE · VIRGINIA · 22901
SCHOOL OF LAW

DANIEL J. MEADOR
JAMES MONROE PROFESSOR OF LAW
804 924-3947

March 24, 1983

Mr. Thomas Smith
American Bar Association
1800 M Street, N. W., 2nd Floor
Washington, D. C. 20036-5886

Dear Mr. Smith:

This is in response to your letter, on behalf of the Criminal Justice Section of the ABA, concerning proposals for amending the rule making procedure for the federal courts.

In general I am in agreement with the proposals as they are embodied in the resolution adopted by the ABA House of Delegates. To me the most important feature of the proposal is the provision that would vest the rule making authority in the Judicial Conference rather than in the Supreme Court. I have long thought that this would be a good step to take. All other features of the proposal, to my mind, are secondary to this, and this is what I suggest that the ABA emphasize in its presentation.

Sincerely,

Daniel J. Meador

Columbia University in the City of New York | *New York, N.Y. 10027*

SCHOOL OF LAW

435 West 116th Street

June 3, 1983

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JUN - 8 1983

Section of Criminal Justice

Thomas C. Smith, Esq.
American Bar Association
Section of Criminal Justice
1800 M Street, NW
Washington, DC 20036

Dear Mr. Smith:

The erding of my regular teaching responsibilities permits me to give consideration to the request in your letter of March 8, 1983, concerning possible changes in Federal rule-making procedures.

Generally, the February 1982 report approved by the House of Delegates is satisfactory with a few exceptions, to wit:

1. While "representativeness" of Advisory Committee members is desirable in the sense that the membership should be drawn from the main branches of the profession as mentioned, the members should not be expected to "represent" their constituents in the legislative sense. Committee members should use their own best judgment and reasoning in considering proposed rules or amendments. They should not view their role as that of mouthpiece for the special interests of their constituents. The language should be modified to make that point clear.

2. I would not favor codifying too strictly the procedures by which the Advisory Committees function. The Committees should be free spend as much time as they think necessary on a proposed amendment or new rule, without being bound to a fixed schedule.

3. The text statement on page 7 at note 12 is not borne out in even the slightest degree, according to my experience of more than three years on the Civil Rules Committee. I suggest the point be investigated carefully before being asserted.

Sincerely,

Maurice Rosenberg

MR/b

SONNENSCHEIN CARLIN NATH & ROSENTHAL
6000 SEARS TOWER CHICAGO, ILLINOIS 60606
TELEX 25-3526

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JUL 18
Section of Criminal Justice

James F. Holderman (312) 876-8938

July 13, 1983

Tom Smith, Esq.
American Bar Association
Criminal Justice Section
1800 M Street, N.W.
Washington, D.C. 20036

Dear Tom:

I am enclosing for your information a letter I just received.

Best personal regards,

James F. Holderman

JFH/gail

enclosure

MICHAEL D. MONICO, LTD.
ATTORNEYS AT LAW
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MICHAEL D. MONICO
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AREA CODE 312
STATE 2-8500

July 8, 1983

James F. Holderman, Esquire
Sonnenschein, Carlin, Nath &
Rosenthal
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Dear Jim:

I wish to express the thanks of the Illinois State Bar Association Criminal Justice Section Council for your assistance in providing us with materials and your thoughts regarding the federal rule making authority. At our meeting on June 17, 1983 in Springfield the Council voted unanimously to support in principle the American Bar Association position as expressed by you in your remarks before the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

Sincerely,

MICHAEL D. MONICO

MDM:cs

APPENDIX "C"

AMERICAN BAR ASSOCIATION COMMISSION ON
STANDARDS OF JUDICIAL ADMINISTRATION

STANDARDS RELATING TO

Court Organization

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The Standards Relating to Court Organization were approved by the American Bar Association House of Delegates in February, 1974.

1974

COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION

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Supreme Court of California
San Francisco, California

Thomas E. Deacy, Jr.
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Kansas City, Missouri

Walter Ely
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9th Circuit
Los Angeles, California

Thomas S. Jackson
Member, District of
Columbia Bar
Washington, D.C.

Harry O. Lawson
State Court Administrator
Denver, Colorado

Charles W. Light
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Jacksonville, Florida

Wade H. McCree, Jr.
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Circuit Court
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Robert L. Trescher
Member, Pennsylvania Bar
Philadelphia, Pennsylvania

Robert H. Wahl
Court of Common Pleas
Wilmington, Delaware

Charles A. Wright
Professor of Law
University of Texas
Austin, Texas

William T. Coleman, Jr., Member, Pennsylvania Bar, Philadelphia, Pennsylvania, and John T. Reardon, Chief Judge, 8th Judicial Circuit of Illinois, Quincy, Illinois, served on the Commission 1971–1973. Abraham Freedman, Judge, U.S. Court of Appeals, 3rd Circuit, served on the Commission 1971. Hicks Epton, Member, Oklahoma Bar, Wewoka, Oklahoma, served on the Commission 1971–1972. Bernard Botein, Retired Presiding Justice, N.Y. Supreme Court, First Department served on the Commission 1971–1974.

Staff:

Geoffrey C. Hazard Jr., *Reporter*
Elisabeth Albert, *Assistant Reporter*
Margaret Leavy, *Assistant Reporter*
Research Assistants: Anna M. Latella, Martin B. McNamara, Joyce E. Moran, Irwin F. Sentilles III
Consultants: Eldridge Adams, Maureen Solomon
Wantland L. Sandel, Jr., *ABA Staff Liaison*
George F. Westerman, *ABA Staff Liaison*, 1971–1973

1.30 Rule-Making, Policy-Making, and Administration: General Principle. Authority to formulate rules of procedure for all types of matters and proceedings in the courts should be vested in the court system, under arrangements in which the legal profession and the public have an opportunity to participate. The court system should control its own administrative policies and should have procedures through which all its judges can participate in developing such policies. Authority to implement the courts' administrative policies should be established in a clear and simple set of management relationships under the supervisory authority of the chief justice.

The authority to promulgate rules of procedure may be vested in the members of the state's highest court or in a rule-making committee composed of judges, lawyers, legal scholars and representatives of the legislature. Authority to promulgate administrative policy should be vested in a judicial council composed of judges from various courts within the system or of the members of the supreme court sitting as a judicial council. The judicial council should act as an advisory committee to the chief justice concerning matters of administration. All judges in the court system should convene regularly as a body to deliberate upon and discuss the work of the court system and their problems and responsibilities in its administration.

1.31 Rule-Making Authority. A court system should have authority to prescribe rules of procedure, civil and criminal. The authority should extend to all proceedings in all courts in the system and should include all aspects of procedure. The authority should be exercised through a procedure that involves use of advisory committees from the bar, notice to and opportunity on the part of members of appropriate legislative committees, and the bar to suggest, review, and make recommendations concerning proposed rules. The rule-making body should have staff assistance for research and drafting.

Commentary

It is generally recognized that the courts should have authority to prescribe rules of procedure governing judicial

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proceedings. Comprehensive rule-making authority exists in most state court systems and in the federal courts, and more limited authority has been conferred on the courts in most other jurisdictions. The rule-making authority goes beyond and involves somewhat different considerations than the authority to prescribe administrative policy for the courts, which is provided for in Section 1.32. The power to prescribe administrative policy is essentially a matter of internal concern to the court system, and is therefore unqualifiedly an inherent judicial power. Procedural rules, however, have broader effects and should be the product of a more widely reaching process of deliberation and decision. The legislature and the bar have a legitimate concern with procedural policy, and the legislature, as the popularly elected representative of the community as a whole, should have the opportunity to participate in determining what the policy should be. It is especially important that the rule-making power be exercised with prudent and diplomatic regard for legislative concern about matters of general public interest, even as to matters that might technically be deemed "procedural."

There are various procedures by which the views of the legislature and of the bar may be brought to bear in procedural rule-making. The procedure used in many states is as follows: The supreme court establishes drafting committees composed of judges, lawyers, and legal scholars, assisted by a staff; the committees prepare, publicly circulate, revise, and finally propose rules and rule changes; the court considers and if necessary revises the proposals and then promulgates them as rules of court. Another successful procedure, used in such states as California, involves a rule-making body that is composed of judges of various courts, lawyers, legal scholars, and representatives of the legislature. The rule-making body, assisted by staff, drafts and circulates rule proposals, makes revisions if necessary in light of responses to the circulation, and then promulgates the

rules or rule changes. The procedure in the federal system has also proved very successful. A rules committee consisting of judges, lawyers, and legal scholars is established by the supreme court; the committee drafts and circulates rule proposals and submits them for approval by the court; if the court approves them, they are submitted to the legislature for review; if the legislature does not reject them, they become effective.

The essential features of a balanced and effective rule-making procedure are the participation of judges, lawyers, legal scholars, and legislators in deliberations concerning the rules the provision of staff assistance for research and drafting and public circulation of proposals for review and comment before their adoption. By means of such a procedure, primary responsibility for procedural rules rests with the court system. The judiciary has special familiarity with the problems of applying and enforcing rules of procedure; it can give attention more promptly and intensively than the legislature to problems of procedure as they arise, and it may be less susceptible to the influence of special interests that would oppose or promote procedural change. The judiciary is also able more freely and easily to enlist the help of specialists in litigation among the bar in formulating procedural rules.

The scope of the rule-making authority should extend to all types of rules that may appropriately be called "procedural" as distinct from "substantive." This includes both civil and criminal rules, and can include rules of evidence, in all courts in the system. There is no distinct boundary between "procedural" rules and rules of "substantive" law, just as there is none between "procedural" rules and court administrative regulations. See the Commentary to Section 1.11(d). Judicial exercise of the rule-making power should not encroach on the legislature's supremacy in matters of substantive law, but the difficult question is how to

identify and preserve this division of responsibilities. All procedural rules have some effects, often very significant ones, on the enjoyment of substantive rights. Hence, all procedural rules have substantive legal implications. At the same time, because substantive legal rules ordinarily imply the possibility of enforcement by judicial procedures, almost all substantive law has procedural implications.

These interconnections make it impossible to define the scope of the rule-making power in precise and enduring terms. Furthermore, some clearly procedural rules are of such great general significance that they should not be modified except by a procedure, such as legislation or constitutional revision, that involves general political assent. The right to jury trial, for example, is in this category.

The proper boundaries of the rule-making power must therefore be worked out by processes that go beyond strict legal definition. One of these processes is reference to legal tradition and precedent. In any particular jurisdiction, many types of rules that could be categorized as either substantive or procedural have long been regarded as in the province either of the legislature or of the courts. Thus, statutes of limitations and rules regarding survival of causes of action have been treated as substantive and therefore subject to legislative mandate, while rules of discovery have been treated as procedural even though they may involve very sensitive questions of public policy. Due recognition of historical categorizations such as these permits accommodation of the legislative and judicial spheres of authority without a general definition of the boundary between them. Another process for determining the boundary between substance and procedure involves one form or another of consultation and joint deliberation. This can be achieved through such mechanisms as law-revision commissions and *ad hoc* study committees and commissions, in which representatives of the legislature, the bar, and the judiciary are participants.

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Mr. KASTENMEIER. Thank you for that brief statement.

I don't know that we will have a chance for complete questioning. The gentleman from Michigan, would you like to come back?

Mr. SAWYER. Yes, Mr. Chairman, if we could have a brief recess.

Mr. KASTENMEIER. With that advice, since I do have some questions myself—I don't think we will be able to conclude in a matter of a couple of minutes and we beg you to be indulgent with us—we will recess again for 10 minutes. When we come back, I will yield to the gentleman from Michigan for questions, and I will have a few myself.

The committee stands in recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

We thank Mr. Holderman for his presentation. I will now yield to my colleague from Michigan, Mr. Sawyer.

Mr. SAWYER. Mr. Holderman, are you with a firm in Chicago?

Mr. HOLDERMAN. Yes; I am with the law firm of Sonnenschein, Carlin, Nath and Rosenthal. They all seem to sound the same on occasion, though.

Mr. SAWYER. Mr. Morrison, do you do a fair amount of practice in the Federal court?

Mr. MORRISON. Yes, sir. I have nine lawyers who work with me. I would say 90 percent of our work is litigation, and 90 percent of that litigation is in the Federal courts, often in the District of Columbia, but not exclusively. We have cases pending in probably half a dozen or more districts at any given time.

Mr. SAWYER. Any particular kind of litigation?

Mr. MORRISON. Yes; it is mostly plaintiff's work, mostly against the Federal Government, sometimes against State agencies, sometimes against corporations or labor unions, on behalf of the people who are otherwise unrepresented.

Mr. SAWYER. They are not injury cases?

Mr. MORRISON. No; they are not personal injury, not diversity, almost entirely Federal question complaints.

Mr. SAWYER. Discrimination, that kind of thing?

Mr. MORRISON. Yes; many of our cases against the Federal Government involve agencies that are not carrying out the law or acting arbitrarily in one way or another, a number of Freedom of Information Act cases, constitutional cases under 1983.

Mr. SAWYER. I notice in your statement you seem to be quite against any control of discovery.

Mr. MORRISON. No; I didn't say that.

Mr. SAWYER. That was the impression I got when I read your statement.

Mr. MORRISON. My statement was that the question of the extent of discovery control was an important question, but to the extent that that was a question that was being addressed by the Rules Committee, it meant that they were not considering other questions.

My own view on the discovery issue is that I think that there is probably much less need for control of discovery with the exception of a few large cases. The problem is often, in my view, that the judges don't take advantage of the procedural devices that are available to them, and that there is rarely, except in a few big

cases, excessive discovery. In those large cases, I would agree with those who are concerned about discovery abuse.

Mr. SAWYER. Of course, I probably spent about 30 years trying lawsuits, mostly. I became convinced in my own mind that while there were some blessings to these pretrials and discovery, that in many instances they virtually priced out of existence modest lawsuits with a cost imposed on multiple pretrials, multiple production demands, and even multiple depositions.

It used to be you might be able to try a $25,000 lawsuit, whereas by the time I left the practice that day had long passed for either part, really, largely because of the rather unlimited avenues of discovery and pretrial and multiple pretrials.

Do you have any view of that?

Mr. MORRISON. I would say that there are some judges who like to bring the parties in on a regular basis for status conferences about what is going on in the case. If that is what you mean by multiple pretrials, I would agree with you 100 percent.

My problem is generally that I can't get the judges to move on the cases that I have already submitted my briefs and made my motions or even tried them sometimes, not that we aren't getting things done fast enough or have problems with my adversary, although I do from time to time, and we make a motion and ask that it be decided.

I would say on the discovery issue, while interrogatories or document production requests can sometimes be expensive, the meter really runs up with you have to take depositions. And, so the proposed rule changes a couple of years ago that would have sharply curtailed the right to use interrogatories would have very much disadvantaged impecunious or less well-heeled plaintiffs.

Mr. SAWYER. I don't know. You get some of these document production requests that would practically fill a semitrailer to deliver them, even though you might be able to let clerks—if it is a company that is the party to the object to it, you don't feel at ease without at least some of your lawyers or you going through them.

Some of them are of the most remote possibility of revealing anything of any use to the trial. They will put these full categories of documents over the last 5 years, or something like that, where you are talking about files and files for them. It may be easy to ask, but to comply is a devastating expense.

Mr. MORRISON. I have two points about that. The first is that I think the number of cases in proportion to the number of cases in the Federal court where that occurs are relatively small.

Second, I would say for those who ask—and it may be cheap to ask—when you get back a warehouseful of documents, you are just about as much disadvantaged as the person who has to produce them.

I have seen cases in which the tactic of the defendant is to overrespond, to give more documents than are asked for, for the very purpose of making it difficult to find the needle in the haystack.

Mr. SAWYER. It gradually from where, instead of having one pretrial, like it kind of started out as sort of the rare case, you didn't have about a half a dozen of them on kind of a minimum, like 8th or 10th or 11th set of interrogatories.

I once heard a Federal judge—he had been a Supreme Court judge in Michigan but went on the Federal bench—give a talk at one of the Sixth Circuit Judicial Conferences. I thought he put the thing very well. There are a lot of ways to tell time. You can get a Timex or some other relatively inexpensive watch that serves your purpose and you can tell what time of day it is, or you can have a chronometer that may cost thousands upon thousands of dollars and tell within precise seconds.

We have, in effect, taken the small lawsuit out of the affordable Timex range and put it in the chronometer range so that now nobody can tell the time of day at all because you can't afford to get into a small- or medium-sized lawsuit.

I think that there is some general criticism that the profession is subject to there, much as the medical profession is with these multiple tests that are all available now and run medical bills up to where just an ordinary, noncomplicated illness can hardly be taken care of.

I think we are doing the same thing in the legal profession. I am not anymore, but I was probably as guilty of it as anybody else a while back, and I think that there ought to be some consideration, a curbing at least on modest-sized lawsuits, limiting it to maybe one pretrial, or at the most two, and maybe one or two sets of interrogatories or some kind of a limitation. I think in the search for perfection we have priced the commodity out of the market, much as the medical profession, in my view, is doing with the more simple medical cases.

Do you have any view of that?

Mr. MORRISON. I think that there is somewhat of a problem. I think that some of the new rule changes that are being proposed today may help alleviate that. I guess my own view is that it is not as serious a problem in a large number of cases as some other problems I see, but it is certainly a grounds for debate.

The reason I even mentioned the discovery question at all, is that I think the committees ought to have a debate about what to debate about. You may feel strongly about discovery rules, as many people do. I may feel that the class action rules need to be amended. Someone else may feel that the rules regarding offers of judgment need to be changed. I just think that if the process were more open, we would have a better understanding of which items had priority on the committees' overcrowded agendas. That is the only reason I brought that in.

Mr. SAWYER. I don't have a particular orientation. I deliberately endeavor to try plaintiffs' cases about equally with defendants' cases. Although I was senior partner of a 70-odd man law firm, I still insisted that we would take a diversification of cases.

I am not speaking from either the plaintiff's or defendant's point of view. It is just kind of a general impression.

One other thing that you mentioned was you were not very happy, apparently, with the class action notice requirements. Of course, you are probably young enough that you don't remember the tremendous abuses those things were subjected to when they first really came on the scene, which really resulted in some of these limitations. For a while, they just ran wild.

Mr. MORRISON. I don't have any doubt that we need to have some controls over the way class actions are handled. My only point is that the question of whether or not individual notice has to be supplied at the plaintiff's expense to every member of the class is a matter which was covered by a rule and could be changed by the rule, and whether it is advisable to change that particular requirement is a matter which the Civil Advisory Committee ought to debate. Insofar as I know today, it has not debated it.

Mr. SAWYER. Of course, I sort of suspected when that rule came on that it was really an effort to control in one manner or another what had become a really widespread abuse that was provoking all kinds of problems.

They may have done it a number of different ways, but it was my impression, although I certainly was not privy to it, that that might have been a rather practical way to put some brakes on what was becoming a rather burgeoning problem.

Thank you, Mr. Chairman. I yield back.

Mr. KASTENMEIER. I have a couple questions.

I gather, while your views are similar, they are not precisely the same. Mr. Holderman, Mr. Morrison suggested it could probably do without both the Supreme Court role in this and the Judicial Conference as well.

You still see some Judicial Conference role, is that correct?

Mr. HOLDERMAN. That is the ABA policy; yes.

Mr. KASTENMEIER. Personally, from your standpoint, if the Judicial Conference were eliminated and the standing committee were enhanced in some way, would that be a plausible alternative?

Mr. HOLDERMAN. My understanding is the Judicial Conference is a creation of statute. I think the Standing Committee—and I could be wrong about this—is a creation of the Judicial Conference.

It would seem to me that the delegation should go to a statutorily created body. However, if Congress by statute abolishes the Judicial Conference and created a committee to take the role of the standing committee, I believe that would probably deal with some of the problem.

Mr. KASTENMEIER. It is not a question of abolishing the Judicial Conference, but it is a question of whether by statute we ought to delegate that responsibility.

Mr. Morrison, the point that Mr. Holderman makes, that after the standing committee is a creature of the Judicial Conference, how can we wipe out the Judicial Conference in terms of its responsibilities?

Mr. MORRISON. I would say it would have to be created by statute, a body such as the standing committee, just as the Judicial Conference was originally created. Obviously it could not be done without some statutory changes. In any event, it might well be that Congress would want to provide another means of appointing the standing committee besides the Judicial Conference.

I did want to respond to one thing Mr. Holderman said in regard to why the ABA was in favor of having the matter go from the Supreme Court to the Judicial Conference. He said, "In reality, the Judicial Conference is now doing it."

I think what we have heard today and my understanding of the process is that in fact the Judicial Conference doesn't do very much

at all. It doesn't make any changes, it doesn't write any notes, it doesn't have a reporter or staff, it is very busy on a number of other matters, and it meets only twice a year.

If you really want to talk about reality, the reality is down at the bottom, at the advisory committee level, with a modest amount of review at the standing committee. I would prefer to have the standing committee be the one that understands that there is going to be no one looking over their shoulder beside the Congress, to take that responsibility fully, and to discharge it without having to report to anybody else other than the Congress at the end.

Mr. KASTENMEIER. As I understand it, Mr. Morrison, you also would not have the congressional role—at least you would change its role from merely a receptacle for reporting to as an entity which could veto or change.

Mr. MORRISON. I guess I would answer the question this way. I would continue the delayed effectiveness provisions, extending them from 90 to 180 days. I would eliminate the one-house veto currently contained in the Rules Enabling Act for the rules of evidence.

Given the delayed effectiveness and given the fact the Congress created the rules process to begin with, it would always be within Congress power to pass another statute, as it can for rules of the Department of Transportation, the Nuclear Regulatory Commission, or any other part of the Government.

Mr. KASTENMEIER. Precisely, but that would be——

Mr. MORRISON. I didn't mean to suggest that you would be a receptacle. What I meant to suggest was that hopefully, if the process were improved, that while you would continue to have the same rights that you have at the present——

Mr. KASTENMEIER. It would be less likely that we would take some other action?

Mr. MORRISON. Precisely.

Mr. KASTENMEIER. Mr. Holderman, to what extent are you concerned about the makeup of the committees? I say this perhaps in agreement with or in contrast to Mr. Morrison's presentation, who does an analysis of the Rules Committee as being made up of the Committee on Rules of Practice and Procedure, two practitioners in large firms; Advisory Committee on Appellate Rules, two practitioners, large firms; and the Advisory Committee on Bankruptcy Rules, four practitioners, three large firms, one firm specializing in bankruptcy.

Obviously that concerns Mr. Morrison. Does that concern you?

Mr. HOLDERMAN. I can only speak on behalf of the ABA and its policy. The ABA's policy is that they be broadly representative. The ABA has taken no position at this point that the committees are not broadly representative.

If our policy connotes that, it shouldn't. The ABA policy is that they be broadly representative, that the membership be for a specified term, and that they be appointed on these staggered term bases. The ABA takes no position with regard to the present makeup of the committees.

Mr. KASTENMEIER. Are either of you concerned that if the process were substantially or radically changed that through much greater access and through openness or absolute openness, that the process

might incur other problems, very present and overt lobbying in terms of given positions and so forth, apparently the complaint being that it sealed itself off from historically; that is to say, there is a certain remoteness about the procedures by which rules are adopted.

I think both complain that you really do not have that sort of access, either to the process or to the nominations, for those that go into the process, and that the information related to you either by notes or notices or anything else is wholly inadequate. Is that not true today?

Mr. MORRISON. I wouldn't go so far as to say it is wholly inadequate. I would say it is not as open and as full an amount of information coming forward as I would like to see.

My answer is that one of our most cherished freedoms is the freedom, indeed, the right, to petition the Government for redress of grievances. I consider the right to petition the Congress, the executive branch, the judiciary branch, and the rulemaking bodies all part of that precious right. Sometimes it is denigrated by calling people lobbyists. I think that petitioning the Government is a first amendment right, and I don't think we ought to denigrate it in any way.

My own view is that we would not have people hanging around judges' chambers trying to get changes in the rules and that we would have an orderly process, given the kind of proceedings and the kind of subject matter we are dealing with.

While it might be a little uncomfortable for some of the members of the committee to have to justify in some respect what they are doing, I think that would be a healthy change. I think the Congress has demonstrated, the executive branch has demonstrated, that we can have more openness without having any adverse side effects, and that on balance the change would be very much in the public interest.

Mr. KASTENMEIER. I use the term "lobbying" so we do not misunderstand one another. I want to characterize the sort of pressure that those people may feel that they are going to be subject to in the worst scheme of things, as far as they are concerned, and whether or not that is a tolerable result in terms of the process.

Mr. MORRISON. I don't believe that there would be any adverse pressure put on these people there. After all, most of them are public officials anyway. I think most judges are not immune from criticism in the sense of being inured to it, that they at least regularly accept it as part of their responsibilities that they will be criticized, either by higher court judges or by the public, for their decisions. I think members of the public who would not want that kind of criticism simply would not have to serve on these committees.

Mr. KASTENMEIER. The reason I suggested that notice might be wholly inadequate was because I think it is unusual that there be a process and that there be people, such as yourselves, who would learn something about the process even today; that that would suggest, at least to this person, that there hasn't been the sort of communication and interchange of information that enables people to be easily knowledgeable about what is going on in terms of the process.

I would only suggest, in conclusion, that we might want to work further with this and we would want to confer further with Judge Gignoux. I would subsequently be curious to have him and others review possible changes and to think seriously about whether the role of the Supreme Court, and indeed even the role of the Judicial Conference and the role of the Congress, ought to be reviewed with the idea in mind of changing it somewhat.

I don't know that it would necessarily cure all the problems, but it might at least make the process more expeditious and manageable. The series of review tiers seems to be almost unnecessary. You have an advisory committee, you have a standing committee, you have a Judicial Conference, you have a Supreme Court, and you have the Congress, as well as, at the early stages, review of the proposals by others.

Maybe the argument is that all of these are checks and balances and are necessary to an excellent result, but then again maybe that is not the case. In any event, I am indebted to both Mr. Morrison and Mr. Holderman, representing the ABA and a public citizen, for their testimony, and certainly that of Judge Gignoux today. I think the committee—and I am sorry more members aren't here—is certainly for the first time in many years informed on the subject of the Rules Enabling Act. Thank you very much.

This concludes today's hearing. The subcommittee stands adjourned.

[Whereupon, at 12:55 p.m. the subcommittee adjourned.]

RULES ENABLING ACT

THURSDAY, MARCH 1, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:20 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Sawyer.

Staff present: Michael J. Remington, chief counsel; David W. Beier and Deborah Leavy, assistant counsel; and Joseph V. Wolfe, associate counsel.

OPENING STATEMENT OF ROBERT W. KASTENMEIER ON H.R. 4144, RULES ENABLING ACT

Mr. KASTENMEIER. This morning the subcommittee will conduct a second day of hearings on the topic of the Rules Enabling Act process. Our first hearing, held in April of last year, was devoted to oversight activities.

Since the April oversight hearing, the Judicial Conference of the United States has taken substantial steps toward the creation of procedures for the promulgation of rules of practice and procedure. As a result of decisions made at the Conference's September 1983 meeting the rules process for the first time in 50 years has a clearly defined set of procedures. I do not know to what extent that this subcommittee had a hand in encouraging this development. Suffice to say that these developments constitute a substantial improvement over past practice. In this regard we are all indebted to the leadership of Judge Gignoux and the advocacy of other interested parties such as the American Bar Association and Public Citizen.

This morning's hearing is to examine the provisions of H.R. 4144, a bill to reform the rulemaking process. The bill makes at least five major changes: One, rulemaking authority is given to the Judicial Conference of the United States rather than to the Supreme Court; two, the "layover period" in Congress after submission is made uniform regardless of the subject matter of the rule; three, the structure of Advisory Committees is formalized; four, operating procedures are set forth in the statute; and five, the same rules for open meetings that apply to Congress and the executive branch agencies are applied to judicial rulemaking.

Today the subcommittee will hear from three distinguished witnesses: Judge Gignoux, representing the Judicial Conference of the

United States; Prof. Burt Neuborne, legal director of the American Civil Liberties Union; and Richard Schmidt, on behalf of the American Society of Newspaper Editors. The focus for this morning's hearing is to ascertain the similarities and differences between rulemaking in the executive branch, legislating in Congress and rulemaking in the Judiciary.

Under current Federal law, as well as under the proposed bill, rules developed by the judiciary have the full force and effect of law. In fact, any rule that is promulgated which conflicts with an earlier congressional enactment supersedes the prior statute. In addition to the legal effect of judicially made rules, the subject matter of such rules is of substantive importance. The existing rules govern class action determinations, set the prerequisites to the issuance of injunctions and other procedural matters that vitally affect the property and liberty rights of citizens. Thus, there is little question that these procedural rules are important.

As Judge Gignoux' testimony earlier this year pointed out, the rulemaking authority of the courts is the direct result of a delegation from the Congress. Especially in light of the Supreme Court decision in the legislative veto case, *Chadha*, we in Congress should be very reluctant to grant greater administrative freedom to the judiciary with respect to powers we delegate to them than we give to either ourselves or to the executive branch.

TESTIMONY OF HON. EDWARD THAXTER GIGNOUX, U.S. SENIOR DISTRICT JUDGE FOR THE DISTRICT OF MAINE, AND CHAIRMAN, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY JOSEPH F. SPANIOL, JR., ESQ., DEPUTY DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, AND LELAND E. BECK, ESQ., COUNSEL, LEGISLATIVE AFFAIRS OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Judge GIGNOUX. Thank you, Mr. Chairman, for your most gracious introduction.

As you have indicated, my name is Edward T. Gignoux. Until June 1 of last year, I was chief judge of the U.S. District Court for the District of Maine. On June 1, I became a senior judge, as I have indicated previously, principally in order to avoid the problems which the active district judges will face if this Congress cannot resolve the bankruptcy problem which is very much on their minds at the present time.

As you indicated, Mr. Chairman, I appear today as chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure.

Mr. KASTENMEIER. Do you have any wisdom to impart to us about the bankruptcy problems?

Judge GIGNOUX. That would be another 2 hours, Mr. Chairman. I would be very happy to do so but I have very strong views, which are in accord, I understand, with the chairman's.

I am appearing, as indicated, in this capacity in response to your invitation for an expression on the views of the standing committee, which I chair, and the Judicial Conference on the provisions of H.R. 4144, a bill which you introduced in October which would

make several substantial changes in the present Rules Enabling Act.

May I say, Mr. Chairman, it is a pleasure and a privilege for me once again to have been invited to appear and testify before this distinguished subcommittee.

I am accompanied again, Mr. Chairman, by Joseph Spaniol, Esq., who is seated on my left, the Deputy Director of the Administrative Office of the U.S. Courts, and Secretary to the Rules Committees; and on my right by Leland Beck, Esq., counsel to the Legislative Affairs Office of the Administrative Office.

I do request, Mr. Chairman, that the prepared statement which I filed in anticipation of the scheduled, but postponed, November 9, 1983, hearing on this legislation, may be accepted as part of the record of the present hearing.

Mr. KASTENMEIER. Without objection, we will be pleased to receive your 10-page statement with appendices attached to it for the record.

Judge GIGNOUX. Thank you very much, Mr. Chairman.

In my oral remarks I will therefore simply highlight the principal points of this prepared statement and comment on one additional point, which will be the impact of the Supreme Court's recent *Chadha* opinion on the Rules Enabling Act, and then be happy to respond to any questions you and the members of the subcommittee may have.

I know it is understood, Mr. Chairman, that in the comments which I am about to make, I am presenting the views of the Judicial Conference, which has endorsed the views of the standing committee as communicated to you in my correspondence some weeks ago. In my comments I will be referring to the sections of title 28 of the United States Code as it would be amended by H.R. 4144.

Our recommendations and views, then, with respect to this legislation are as follows:

First, proposed section 2072 would, as you have indicated, Mr. Chairman, transfer the rulemaking authority from the Supreme Court to the Judicial Conference.

In response to your inquiry, Mr. Chairman, the Chief Justice has advised, and I quote, that "The members of the Court see no reason to oppose legislation to eliminate this Court from the rulemaking process."

The Judicial Conference believes that the question of whether the Supreme Court should continue to promulgate rules changes is a question of policy for that Court and the Congress, but if a change is to be made, we agree that the authority to promulgate rules and rules amendments should be vested in the Judicial Conference, either directly or by delegation from the Supreme Court.

In this connection, Mr. Chairman, the proposed legislation would remove the Supreme Court entirely from the rulemaking process and would vest the promulgating function directly in the Judicial Conference.

Concern has been expressed by, among others, the American Bar Association criminal justice section and the Conference of State chief justices, as to the propriety of the Congress enacting such a change.

These two organizations and other thoughtful commentators point out that the prestige and authority of the Supreme Court are important to acceptance of the rules, not only within the Federal judicial system but by the many States, approximately two-thirds of which have used the Federal rules as models.

We suggest that the Congress may wish to consider the alternative suggestion of the American Bar Association Criminal justice section and the Conference of State chief justices that the rulemaking authority remain with the Supreme Court, but that that Court be authorized to delegate this responsibility to the Judicial Conference.

I shall now address section 2073. Section 2073 (a) and (b) would authorize the Judicial Conference to appoint the members of the Rules Committees, would specify the number and the composition of the Rules Committees and would fix the terms of committee members.

To a large extent, this bill codifies the existing committee structure. Nevertheless, it is our view that the specificity of the bill would create an undesirable in flexibility and that the question of the number of advisory committees which will be actually staffed, the composition of those committees and the terms of committee members should be left to the Judicial Conference.

In my prepared statement I have attempted to detail some of the practical problems which we perceive that rigid statutory requirements would present.

The next two subsections of section 2073, subsections (c) and (d), would specify the procedures to be followed by the Rules Committees in drafting and recommending rules changes.

Again, we sense that prescribing operating procedures in a statute is unnecessary and undesirable.

As you have indicated, Mr. Chairman, the standing committee, after consultation with the chairmen of the various Rules Advisory Committees, has formally adopted a written statement of operating procedures governing the work of all the Rules Committees. A copy of this is attached to my prepared statement and copies have been widely circulated to the bench and bar and forwarded to the members of the House and Senate Judiciary Committees.

May I say, Mr. Chairman, you are entirely correct in your thought that the oversight hearings which you held last April, at which I testified, to a large extent stimulated the formalization of our procedures.

This statement of operating procedures reiterates longstanding practices of the Rules Committees; it incorporates most of the suggestions included in the section 2073 of H.R. 4144, and substantially more.

We believe that the wide circulation and publication of this statement should alleviate the concern of some critics that the present rulemaking process is not sufficiently open. And, indeed, Mr. Chairman, since the adoption of these operating procedures, we have noted a substantial increase in both the quantity and the quality of the comments which we have been receiving on the proposed amendments to the civil and criminal rules that were published last fall.

In sum, it is our view, that flexibility in respect to operating procedures is desirable and that they should not be crystalized in a statute.

We are particularly concerned, Mr. Chairman, and we realize that others disagree, by the requirement of section 2073(c) that all committee meetings be open to the public, that public notice of each meeting be given, and that a transcript of each meeting be prepared.

I have set forth in my prepared statement the reasons which lead to our view that this proposal would seriously impair the efficient functioning of the rulemaking process without any corresponding benefits.

We believe that the objective of full public awareness and participation in rulemaking is adequately achieved by the operating procedures which we follow.

Opportunity for public participation is assured by the wide circulation given to proposed rule changes, by the opportunity for comment afforded to any interested person either to submit written comments or to attend and present oral views at the public hearings that are held on the draft rules.

In addition, our procedures require that those who have submitted comments must be informed of the action taken by a committee thereon.

Finally, all the records of the Rules Committees, written comments received, correspondence relating thereto, transcripts of public hearings, minutes of Rules Committee meetings, advisory committee and standing committee reports, are available to the public at the Administrative Office of the United States Courts.

It is our belief that the evident desire of some to require open meetings may indicate a misunderstanding of how the Rules Committees operate.

These committee meetings, particularly the advisory committee meetings, are drafting sessions. They are similar to the drafting work done by congressional committee staff prior to the introduction of a bill in Congress.

Indeed, we are aware of no Sunshine statute or congressional rule which requires that meetings which are conducted solely for the purpose of drafting proposals for introduction to the Congress, or in the case of administrative agencies for submission pursuant to notice and comment procedures, be open to the public.

We doubt that the public generally or even members of the bar would derive significant benefits from monitoring these discussions. In short, it is our view that the requirement of open meetings would result in undesirable administrative delays, additional cost, and the sacrifice of important values of free and open discussion without any offsetting benefits.

Proposed section 2074, on which I will now comment, would require that rules amendments be transmitted to Congress by March 15 to become effective on December 15 in the year in which they are transmitted.

For the reasons which are set forth in my prepared statement, it is our view that the 9-month waiting period would perhaps unnecessarily prolong the rulemaking process.

Our view is that the rules amendments should be transmitted to Congress before May 1, as is currently authorized, and that a uniform 180-day waiting period be provided for all rules changes.

We agree that Congress should determine the amount of time needed to review proposed rules and we would leave that judgment to Congress. But we do suggest that the May 1 cutoff date and a uniform 180-day waiting period would be the most satisfactory resolution.

The final section of this legislation, Mr. Chairman, is section 3, which would amend section 2071 of title 28, to require circuit council and Judicial Conference review of local court rules, for consistency with the Federal rules.

As set forth in my prepared statement, we agree that the whole area of local rules, which have proliferated in recent years, and many of which are inconsistent with the Federal rules, requires thorough review.

The Rules Committees have already begun an indepth study of local rules. Indeed, the Civil Rules Advisory Committee is currently circulating a proposed amendment to civil rule 83 to improve the local rulemaking process by requiring public notice of proposed local rules changes and an opportunity for comment thereon.

We are striving to achieve a satisfactory solution within the existing rulemaking process. In the meantime, it is our sense that it would be premature for the Congress to act.

Although not included in my prepared statement, I have been asked to comment on the impact of the Supreme Court's recent *Chadha* opinion on the Rules Enabling Act.

In *Chadha*, as you are aware, the Supreme Court struck down the one-house veto provision of section 244 of the Immigration and Naturalization Act.

The present evidence Rules Enabling Act, 28 U.S.C. section 2076, contains a one-house veto provision similar to that declared unconstitutional by the Supreme Court in *Chadha*.

It is clear that legislation to eliminate this provision is needed. H.R. 4144, specifically proposed section 2074(a), would accomplish this result.

At the same time, we believe that the report and wait provisions of the other present Rules Enabling Acts and proposed section 2074(a) of H.R. 4144 are consistent with *Chadha*, which invalidated legislative vetos but not report and wait requirements.

Footnote 9 in Chief Justice Burger's opinion appears expressly to recognize that the Supreme Court approved the report and wait provision of the Rules Enabling Acts in the *Sibbach* case in 1941.

That concludes my oral presentation, Mr. Chairman. I thank you once again for the privilege of appearing before you today. I shall be happy to attempt to answer any questions which you or the members of the subcommittee may have.

[The statement of Judge Gignoux follows:]

PREPARED STATEMENT

HONORABLE EDWARD THAXTER GIGNOUX

UNITED STATES SENIOR DISTRICT JUDGE
FOR THE DISTRICT OF MAINE

and

CHAIRMAN OF THE STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

before the

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND
THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

on

H.R. 4144,
A BILL TO AMEND THE RULES ENABLING ACTS

November 9, 1983

Mr. Chairman, and Members of the Subcommittee, I appear today as Chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure in response to your request for the views of the Standing Committee and the Judicial Conference on the provisions of H.R. 4144, the "Rules Enabling Act of 1983," a bill introduced by your chairman on October 18, 1983 to amend the provisions of Titles 18 and 28 of the United States Code, commonly called the Rules Enabling Acts. It is a pleasure - and a privilege - once again to appear before this distinguished Subcommittee.

INTRODUCTION

H.R. 4144 would modify the procedures by which Federal court rules are developed in several significant respects. As stated by your Chairman, in his remarks when introducing the bill, the purpose of the proposed changes in the rulemaking process is "to assure greater openness, consistency, and quality in the Federal rules." 129 Cong. Rec. H8301 (daily ed. Oct. 18, 1983). As your Chairman further pointed out in his introductory statement, in the last few years interest in Federal rulemaking has spurred increased discussion, criticism, and proposals for change by academic critics and other learned commentators, who have discussed alleged problems and have suggested reforms. Indeed, the Chief Justice has personally noted these developments and has observed that Federal rulemaking procedures may require "a fresh look." See W. Burger, The State of the Federal Judiciary, 1979, 65 A.B.A.J. 358, 360 (1979).

On April 21 of this year, this Subcommittee held an oversight hearing on the rules process, the first such congressional hearing in the nearly 50 years of federal rulemaking. I was privileged to testify at that hearing. Also testifying were a representative of the American Bar Association, James F. Holderman, Esquire, and a representative of the Public Citizens Litigation Group, Alan B. Morrison, Esquire. In my testimony, which is of record with this Subcommittee, I presented a brief history of judicial rulemaking, a description of the present rulemaking process, and comments concerning several current criticisms of our present procedures. Mr. Holderman and Mr.

Morrison recommended that the Rules Enabling Acts be amended to eliminate the Supreme Court from the rulemaking process and to give the Judicial Conference authority to promulgate rules of practice and procedure, or to authorize the Supreme Court to delegate its authority to the Judicial Conference. Both suggested that the period allowed for congressional consideration of proposed rules changes (currently 180 days for evidence rules and 90 days for all other rules) be made uniform. They also proposed a number of procedural changes to increase public understanding of the rulemaking process.

Subsequent to the hearing, your Chairman forwarded to the Chief Justice and to me as Chairman of the Judicial Conference Standing Committee copies of a draft bill that is substantially identical to H.R. 4144, the bill presently before you. The Chairman made clear that the purpose of submitting the draft bill was "to solicit formal comments prior to introduction." As requested by him, the Standing Committee reviewed the draft bill at its meeting on June 17 of this year, and on July 22 I wrote to the Chairman communicating our views. A copy of my letter is attached to this statement as Appendix A. Thereafter, I presented the Standing Committee's recommendations on the draft bill to the Judicial Conference in September. The Judicial Conference endorsed our views, and on September 28 I so advised your chairman. A copy of that letter is attached to this statement as Appendix B.

As I have indicated, H.R. 4144 is substantially identical to the draft bill which was reviewed by the Standing Committee and the Judicial Conference. Therefore, in the following comments on H.R. 4144, I am presenting the views of the Judicial Conference.

RECOMMENDATIONS

Our recommendations with respect to the provisions of H.R. 4144 are as follows:

A. Rulemaking Authority

H.R. 4144 would amend the Rules Enabling Acts, 28 U.S.C. §§ 2072, 2075, 2076, and 18 U.S.C. §§ 3771, 3772 (Chapter 237), to vest the rulemaking

authority in the Judicial Conference, rather than in the Supreme Court. In response to Mr. Kastenmeier's inquiry, the Chief Justice has advised that "the members of the Court see no reason to oppose legislation to eliminate this Court from the rulemaking process." The Judicial Conference believes that the question of whether the Supreme Court should continue to promulgate rules changes is a question of policy for the Supreme Court and the Congress, but that if a change is to be made, the authority to promulgate rules and rules amendments should be vested in the Judicial Conference, either directly or by delegation from the Supreme Court.

H.R. 4144 proposes to remove the Supreme Court entirely from the rulemaking process and to vest the promulgating function directly in the Judicial Conference. The Congress may wish, however, to consider the alternate suggestion of the American Bar Association that the rulemaking authority remain with the Supreme Court, but that the Court be authorized to delegate this responsibility to the Judicial Conference. A number of thoughtful commentators, and some members of the Standing Committee, are of the view that the prestige and authority of the Court are important to the acceptance of the rules. They also believe that having the Federal rulemaking process conducted under the aegis of the Supreme Court may be important not only to the Federal judicial system, but perhaps even more important to the various States which have adopted the Federal Rules of Civil, Criminal, and Appellate Procedure and the Federal Rules of Evidence, either in whole or in part.

B. Transmission of Rules to Congress

H.R. 4144 would require that rules amendments be transmitted to Congress by March 15, to become effective on December 15 of the year in which they are transmitted. The current Rules Enabling Acts require that rules changes be transmitted to Congress by May 1, to become effective after a

waiting period of not less than 90 days (180 days for the Evidence Rules). The Judicial Conference is of the view that it is for Congress to determine the amount of time it needs to review proposed rules changes, but we agree that a uniform waiting period should be provided for all rules. We question, however, the need or desirability of a nine-month waiting period, which would further extend the already lengthy time required to effect rules changes. A shorter time period, not to exceed six months, would seem more practical.

The Judicial Conference recommends that the present May 1 submission date be retained. A requirement that rules amendments be transmitted to Congress by March 15 would make it impossible for the Judicial Conference to act on proposed rules changes at its mid-March meeting and submit them either to the Supreme Court or directly to the Congress by that deadline. A one-year delay could ensue before rules changes could become effective. We suggest that rules amendments be transmitted to Congress before May 1, as currently authorized, and that a uniform 180-day waiting period be provided for all rules changes.

C. Committee Structure

H.R. 4144 would authorize the Judicial Conference to appoint the members of the rules committees, would specify the composition of the rules committees, and would fix the terms of committee members. In large measure the bill codifies the existing committee structure. Nevertheless, the Judicial Conference is of the view that the specificity of the bill would create undesirable inflexibility and that the composition of the rules committees and the terms of the committee members should be left to the Judicial Conference. We have several specific comments on these provisions of the bill:

First, H.R. 4144 appears to mandate the establishment of separate committees to consider civil, criminal, evidence, bankruptcy and appellate

rules. We question the desirability of this requirement. The Advisory Committee on Evidence Rules was discharged following adoption of the Federal Rules of Evidence in 1975. Although consideration now is being given to re-establishing an Advisory Committee on Evidence Rules to review our experience under the rules adopted in 1975, there has been no need for such a committee during the past eight years. We suggest, therefore, that the proposed legislation should not require establishment of an Advisory Committee when a committee may not be necessary.

Second, H.R. 4144 provides that rules committees shall consist of "a balanced cross section of bench and bar, and trial and appellate judges." This provision simply restates the requirement of the 1958 Judicial Conference resolution, a copy of which is attached to this statement as Appendix C. It is our belief that the present rules committees are broadly representative. They include experienced district and circuit judges, members of the bar, and law professors, widely distributed geographically and chosen from diverse professional backgrounds. A current list of rules committees members is attached to this statement as Appendix D. We suggest, therefore, that this provision in H.R. 4144 is unnecessary.

Finally, we are particularly disturbed by the proposed statutory provision limiting terms of committee members to ten years (two five-year terms). The original Advisory Committee on Bankruptcy Rules served for 12 years, working first to revise the general orders in bankruptcy, and then to draft new bankruptcy rules. In midstream, Congress passed an Enabling Act, 28 U.S.C. § 2075, granting the Supreme Court authority to promulgate bankruptcy rules. As a result, it took 12 years for the Committee to complete its work. It would have been chaotic to have discharged the Committee after ten years when the work was so near completion. Similarly, the Advisory Committee on Rules of

Evidence was kept in existence beyond ten years while the proposed rules were pending before Congress. The Committee was thus available to work with Congress in resolving the questions which had been raised. While these were unusual situations involving the drafting of complete new sets of rules, they point up the desirability of maintaining flexibility.

D. Operating Procedures

H.R. 4144 would specify in detail the procedures to be followed by the Standing Committee and the Advisory Committees in drafting and proposing recommended rules changes. We believe that specifying operating procedures in a statute is unnecessary and undesirable.

The Standing Committee is aware that some members of the bench, the bar and the public, in spite of efforts to inform them, have been unfamiliar with the functioning of the present rulemaking process. The result has been confusion and occasional criticism. In order to ensure a more informed understanding of our procedures, at its June 17 meeting the Standing Committee, after consultation with the Advisory Committee chairmen, formally adopted a written Statement of Operating Procedures governing the work of the Standing Committee and the Advisory Committees. A copy is attached to this statement as Appendix E. Copies of the Statement of Operating Procedures have been included in the pamphlets containing the preliminary drafts of proposed civil and criminal rules amendments recently circulated to the bench and bar, and forwarded to the members of the House and Senate Judiciary Committees. At our request, the pamphlets have been reprinted in the advance sheets of Federal Reporter 2d and Federal Supplement, and will become a permanent part of Federal Rules Decisions. See 712 F.2d No. 2 (Sept. 12, 1983); 566 F. Supp. No. 3 (Sept. 12, 1983); 98 F.R.D. 347-51, 389-93 (1983). In addition, the Statement will be included in future pamphlets containing preliminary draft rules amendments.

The American Bar Journal also has published an article describing the rulemaking process prepared by the Secretary to the rules committees, Joseph F. Spaniol, Jr., Esq. 69 A.B.A.J. 1645 (1983).

The Statement of Operating Procedures codifies long-standing practices of the rules committees and incorporates most of the suggestions included in H.R. 4144. The wide circulation and publication of the Statement of Operating Procedures should alleviate the concern of some critics that the present rulemaking process is not sufficiently open. Flexibility with respect to operating procedures is desirable and we believe that it is unnecessary to formalize these procedures in a statute. We are also fearful that a statutory specification of procedures might lead to satellite litigation challenging rules, not on their merits, but simply because someone believes that a statutory procedural mandate has not been followed to the letter. Accordingly, we suggest that procedural matters remain with the rules committees and the Judicial Conference.

E. Open Meetings

H.R. 4144 would require that all rules committee meetings be open to the public, "except when the body so meeting, in open session and with a majority present, determines that all or part of the remainder of the meeting on that day shall be closed to the public." The bill would also require that a transcript of each such meeting be prepared and made available to the public and that sufficient notice of each meeting be given "to enable all interested persons to attend." This "sunshine" proposal would introduce a degree of complexity and expense that is neither necessary nor desirable. We concur fully in the objective of full public awareness and participation in the rulemaking process, but we are of the view that any public perception that the process is not now sufficiently open will be satisfied by the Statement of Operating Procedures

that has been adopted by the Standing Committee and is being widely circulated.

The evident desire of some critics to require open meetings indicates, we feel, a misunderstanding of how the rules committees operate. The initial meetings of an Advisory Committee are "drafting sessions" at which proposals for changes in the rules are received from diverse sources and drafts of proposed rules amendments are prepared for public circulation. As a legislative analogy, the work at these meetings is similar to the drafting work done by a congressional committee staff prior to the introduction of a bill in Congress for public debate and scrutiny. Another analogy would be rule drafting by administrative agencies prior to publication of a proposed rule for comment.

Under our present procedures, opportunity for public participation in the rulemaking process is provided by the wide circulation given to proposed rules changes and the time given for comment by any interested persons. Draft rules which are proposed by an Advisory Committee, together with reporter's notes, are widely circulated. Written comments are invited and public hearings are held on these drafts. The schedule of public hearings is set out in the published pamphlet of draft rules amendments and hearings are held four to five months after publication and prior to the closing date for written comment.

Following the time provided for written comment, the Advisory Committee meets to consider all comments received, and those who have submitted comments are informed of the action taken by the Committee thereon. If a substantial change is made in the circulated proposal, present practice calls for further publication, opportunity for comment, and public hearing with respect to any substantive change. Finally, the written comments received, the transcripts of the public hearings, and the Advisory Committee and Standing Committee reports are available to the public at the

Administrative Office. The actions taken by the Judicial Conference are summarized in its reports. The final draft of new rules and rules amendments, as submitted to the Supreme Court, are also publicly available at the Administrative Office.

The Judicial Conference questions whether it is either necessary or wise to provide for public meetings of the Advisory Committees and the Standing Committee. We are apprehensive that public meetings would inhibit the kind of frank and candid discussion of litigation problems and controversial proposals for reform possible only in drafting sessions. It would be impossible to formulate rules changes without such frank discussions. In addition, we doubt that the public generally, or even members of the bar, would derive significant benefits from "monitoring" these discussions. The Advisory Committees solicit comments on proposed rules changes from a wide range of sources, and the formal documents of each step of the rulemaking process are publicly available. We doubt that more than this can be done without sacrificing more important values. It is our view that introducing a requirement of open meetings would add undesirable complexity and delay to the rules program. We believe that the procedures currently being followed by the rules committees, as codified in the recently adopted Statement of Operating Procedures, assure that the process is sufficiently open and present adequate opportunity for public participation.

F. Local Rules

H.R. 4144 would require circuit council and Judicial Conference review of local rules for consistency with the Federal rules. The Standing Committee agrees that the whole area of local rules requires a thorough review, and the Committee has decided to initiate a study of local court rules, which have proliferated in recent years and have been increasingly criticized. In the

meantime, the Advisory Committee on Appellate Rules has already begun a study of the local rules of the courts of appeal, and the Advisory Committee on Civil Rules will be initiating a study of local district court rules. In addition, the latter Committee is currently circulating a proposed amendment to Civil Rule 83 to improve the local rulemaking process by requiring public notice of proposed local rules and an opportunity for comment thereon. We are hopeful that we may achieve a satisfactory solution within the existing rulemaking process. Until these studies have been completed, and the comments of the bench and bar on the proposed Rule 83 amendment have been obtained, it is our view that it would not be appropriate to place additional responsibilities on the busy circuit councils.

CONCLUSION

The Judicial Conference believes that it is appropriate for Congress now to address the question of Supreme Court participation in rulemaking and the question of the time allowed for congressional review. Aside from these two issues, we recommend against including the details of committee structure, membership, and operating procedures in a statute.

I thank you, Mr. Chairman and Members of the Subcommittee, for the privilege of appearing before you today.

APPENDIX A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

EDWARD T. GIGNOUX
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
WALTER R. MANSFIELD
CIV'L RULES
WALTER E. HOFFMAN
CRIMINAL RULES
RUGGERO J. ALDISERT
BANKRUPTCY RULES
PIERCE LIVELY
APPELLATE RULES

July 22, 1983

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

The Judicial Conference Committee on Rules of Practice and Procedure at its session on June 17th reviewed the draft bill to amend the Rules Enabling Acts as you requested in your letter of May 3rd. I am pleased to offer the Committee's views and comments.

Rulemaking Authority

1. The draft bill would transfer the rulemaking authority from the Supreme Court to the Judicial Conference. Our Committee considered this proposal, as well as the American Bar Association's suggestion that the rulemaking authority remain with the Supreme Court but that the Court be authorized to delegate its responsibility for rulemaking to the Judicial Conference. Some members of the Committee believe there is an intangible benefit to the Federal judicial system in having the Supreme Court promulgate rules, and perhaps, an even greater benefit to the various state jurisdictions which have adopted the Federal Rules of Civil and Criminal Procedure, either in whole or in part. Having the Federal rulemaking process conducted under the aegis of the Supreme Court may be important, particularly to the States.

The Committee concluded that the question of whether the Supreme Court should continue to promulgate rules changes is a matter of policy for the Congress and the Supreme Court, but that if the Supreme Court is to be taken out of rulemaking, the Judicial Conference is the appropriate body to continue to perform this function, either directly or by delegation from the Supreme Court. We shall make this recommendation to the Judicial Conference when it meets in September and thereafter advise you of Conference action.

Transmission of Rules to Congress

2. The draft bill would require that rules amendments be transmitted to Congress by March 15th to become effective on December 15th. We agree that Congress should determine how much time it needs to review proposed rules amendments and that the time period should be uniform for all rules. Yet a waiting period of nine months may be too long, particularly when the need for rules changes may be urgent because of new legislation or court decisions. A shorter time period, not to exceed six months, would seem more practical.

Moreover, a requirement that rules be transmitted by March 15th would make it impossible for the Judicial Conference to act at its mid-March session in time to transmit rules amendments either to the Supreme Court or directly to the Congress by the March 15th deadline. A one year delay could ensue before rules changes could become effective. We suggest that rules amendments be transmitted to Congress before the first day of May as currently authorized and that a uniform 180-day waiting period be provided for all rules changes.

Committee Structure

3. The draft bill would specify the composition of the Rules Committees and the terms of Committee members. In large measure, the draft bill incorporates the existing organization. Nonetheless, we believe the specificity of the draft creates an undesirable inflexibility and that the determination of organizational structure and the terms of committee members should be left to the Judicial Conference. See the attached 1958 resolution of the Judicial Conference.

We are particularly disturbed by the proposed statutory provision limiting terms of members to ten years. The original Advisory Committee on Bankruptcy Rules served for twelve years, working first to revise the General Orders in Bankruptcy, and then to draft new bankruptcy rules. In midstream, Congress passed an enabling Act, 28 U.S.C. 2075, granting the Supreme Court authority to promulgate bankruptcy rules. As a result, it took twelve years for the Committee to complete its work. It would have been chaotic to have discharged the Committee after ten years when their work was so near completion.

Similarly, the Advisory Committee on Rules of Evidence was kept in existence beyond ten years while the proposed rules were pending before Congress. The Committee was thus available to work with Congress in resolving the questions which had been raised.

While these were unusual situations involving the drafting of complete new sets of rules, they point up the desirability of maintaining flexibility.

Appointment of Committee Members

4. The draft bill would authorize the Judicial Conference to appoint the members of the Rules Committees. Presumably, this provision is designed to provide a measure of relief to the Chief Justice. As a practical matter, however, we believe this proposal would not attain its objective. As Chairman of the Judicial Conference, the Chief Justice is responsible for the ongoing work of the Conference. Even under the language proposed in the draft bill, the Chief Justice necessarily would be involved in the selection of committee members. It is indeed likely that the Conference would delegate its appointing authority to the Chief Justice, since the Conference meets only periodically. On the other hand, if the Conference did not delegate its authority, additional meetings of either the Conference or its Executive Committee probably would be necessary. The result would be to increase rather than decrease the work of the Chief Justice. We suggest that the authority to appoint committee members remain with the Chief Justice as provided in the 1958 Judicial Conference Resolution.

Operating Procedures

5. The draft bill would specify the procedures to be followed by the Rules Committees in drafting and recommending rules changes. At the June 17th meeting, our Committee formally adopted a written statement of comprehensive operating procedures governing the work of the Standing Committee and the Advisory Committees. A copy is enclosed. We intend to publish these procedures and include them in proposed rules amendments hereafter circulated to the bench and bar for comment. This statement of procedures codifies long-standing practices of the Rules Committees and incorporates most of the suggestions included in the draft bill. Our Committee believes that flexibility with respect to operating procedures is desirable and that it is unnecessary to formalize these procedures in a statute. We are also fearful that a statutory specification of procedures might lead to litigation challenging rules, not on their merits, but simply because someone believes that a statutory procedural mandate has not been followed to the letter. We suggest that procedural matters remain with the Rules Committees and the Judicial Conference.

Open Meetings

6. The draft bill would require that all committee meetings be open to the public, that public notice of each meeting be given, and that transcripts thereof be prepared. This proposal would introduce a degree of complexity and expense that we believe is neither necessary nor desirable. Our Committee concurs fully in the objective of full public awareness and participation in the rulemaking process, but we believe that any public perception that the process is not now sufficiently open will be ameliorated by the formal statement of operating procedures which has been adopted by the Committee.

The desire of some to have universally open meetings indicates a misunderstanding of how the Rules Committees operate. The initial meetings of an advisory committee are "drafting sessions" at which proposals are prepared for public circulation. As a legislative analogy, the work at these meetings is similar to the drafting work done prior to the introduction of a bill in Congress for public debate and scrutiny. Another analogy would be rule drafting by administrative agencies prior to publication for comment.

The public participation phase of the rulemaking process opens with the widespread circulation and accompanying publicity given to proposed rules changes, and continues through the period of time provided for written comments and public hearings. The Advisory Committee then meets to consider all comments received. If a substantial change is made in the circulated proposal, existing practice calls for notice, publication, comment and public hearing with respect to any substantive change.

Occasionally, an Advisory Committee will meet to consider the suggestions it has received immediately following a public hearing in whatever city the hearing has been held. Frequently small subcommittees on style, consisting of the reporter and a few members of the full Advisory Committee, will meet at a time and place convenient to the busy members. The dates for these sessions must frequently be adjusted to meet busy schedules. Introducing a requirement of open meetings, with notice, would in our view add undesirable complexity and delay to the program. In the circumstances, we believe the objective of securing public participation should be left to the sound discretion of those charged with the rulemaking responsibility.

Local Rules

7. The draft bill would set up a procedure for Circuit Council and Judicial Conference review of local rules for consistency with the Federal Rules. Our Committee agrees that this whole area of local rules requires a thorough review, and the Committee will consider this complex problem at its next session. Indeed, the Advisory Committee on Appellate Rules has already begun a study of the local rules of the Courts of Appeals, and the Advisory Committee on Civil Rules is studying local District Court Rules. We are hopeful that we may achieve a satisfactory solution within the existing rulemaking process. Accordingly, placing additional responsibilites on the busy Circuit Councils and the Judicial Conference at this time does not seem wise.

Summary

8. Our Committee believes that it is appropriate for Congress now to address the question of Supreme Court participation in rulemaking and the question of the time allowed for Congressional review. Aside from these two issues, the Committee recommends against including the details of committee structure, membership and operating procedures in a statute.

We appreciate the opportunity to comment on your draft bill. Thank you for your gracious invitation.

Sincerely,

Edward T. Gignoux,
Chairman

Enclosures

APPENDIX B

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

EDWARD T GIGNOUX
CHAIRMAN

JOSEPH F SPANIOL, JR
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
WALTER R MANSFIELD
CIVIL RULES
WALTER E HOFFMAN
CRIMINAL RULES
RUGGERO J ALDISERT
BANKRUPTCY RULES
PIERCE LIVELY
APPELLATE RULES

September 28, 1983

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

With further reference to my letter of July 22, 1983, setting forth the views of the Judicial Conference Standing Committee on Rules of Practice and Procedure on your draft bill to amend the Rules Enabling Acts, I am pleased to report that at the semiannual meeting of the Judicial Conference on Wednesday, September 21, 1983, the Conference endorsed the views of the Standing Committee as set forth in my July 22 letter.

Again, on behalf of the Standing Committee and the members of the Conference, may I say that we appreciate your courtesy in offering us the opportunity of commenting on this bill. We stand ready to assist you and your staff in the drafting of any legislation you may propose for modification of the Rules Enabling Acts.

With best personal wishes.

Sincerely,

Edward T. Gignoux

APPENDIX C

RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURTS

After a full discussion the Conference approved the following recommendations of the Committees:

(1) That a standing Committee on Rules of Practice and Procedure be created, the members to be appointed by the Chief Justice and to consist in addition to members of the Judicial Conference of a suitable number of representative judges, lawyers and law teachers.

(2) That five advisory committees be created, one on practice and procedure in civil cases; one on practice and procedure in criminal cases; one on practice and procedure in bankruptcy; one on rules of practice and procedure to be applicable to or govern in admiralty cases; and one to recommend general uniform rules of practice and procedure in the courts of appeals and rules governing review of Tax Court decisions, the members of the advisory committees to be appointed by the Chief Justice for terms of four years, the first appointments to be for staggered terms of two and four years, the members to be eligible for reappointment for one additional term only, and the members to consist of broadly representative judges, lawyers and law teachers.

(3) The function of the standing Committee on Rules of Practice and Procedure shall be to coordinate the work of the several advisory committees, to make suggestions to them of proposals to be studied by them, to consider proposals recommended by the advisory committees and to transmit such proposals with its recommendation to the Judicial Conference or to recommit them to the appropriate advisory committee for further study and consideration, and to make recommendations to the Judicial Conference with regard to any other matters in the field of practice and procedure as to which the Conference may be called upon to act.

(4) Each of the advisory committees shall carry on a continuous study of the operation and effect of the rules of practice and procedure now or hereafter in use in its particular field, and shall consider, and from time to time propose to the Judicial Conference through the standing Committee on Rules of Practice and Procedure, such changes in and additions to those rules as the advisory committee may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.

(5) To assist the committees in carrying out their duties a reporter and such associate or assistant reporters as may be necessary should be appointed by the Chief Justice for limited terms of service and at adequate salaries. Supporting staff for the work of the reporter and of the committees should be provided by the Administrative Office.

(6) Steps should be taken to encourage the judicial conferences and councils of the circuits to cooperate through suitable committees in each circuit, and similar steps should be taken in respect to securing the cooperation of national, state and local bar associations.

September 18, 1958

APPENDIX D

Committee on Rules of Practice and Procedure

Edward T. Gignoux, Chairman	Sr.Dis.J., Portland, ME
Edward H. Hickey	Esq., Chicago, IL
James S. Holden	Dis.J., Rutland, VT
Amalya L. Kearse	Cir.J., New York, NY
Francis N. Marshall	Esq., San Francisco, CA
Wade McCree	Prof., Ann Arbor, MI
Carl A. McGowan	Sr.Cir.J., Washington, DC
Wayne LaFave	Prof., Champign, IL

Advisory Committee on Appellate Rules

Pierce Lively, Chairman	Cir.J., Danville, KY
E. Milton Farley, III	Esq., Richmond, VA
J. Smith Henley	Sr.Cir.J., Harrison, AR
Rex E. Lee	Sol.Gen., Washington, DC
Edward D. Re	Int'l Trade, New York, NY
Ira C. Rothgerber	Esq., Denver, CO
Edward A. Tamm	Cir.J., Washington, DC
Eugene A. Wright	Cir.J., Seattle, WA
Kenneth F. Ripple, Reporter	Prof., Notre Dame, IN

Advisory Committee on Bankruptcy Rules

Ruggero J. Aldisert, Chairman	Cir.J., Pittsburgh, PA
Clive W. Bare	Bkcy.J., Knoxville, TN
John T. Copenhaver, Jr.	Dis.J., Charleston, WV
Robert W. Foster	Prof., Columbia, SC
Asa S. Herzog	Esq., Ft. Lauderdale, FL
Charles A. Horsky	Esq., Washington, DC
Herbert Katz	Bkcy.J., San Diego, CA
Lawrence P. King	Prof., New York, NY
Richard L. Levine	Esq., Washington, DC
Beryl E. McGuire	Bkcy.J., Buffalo, NY
Norman H. Nachman	Esq., Chicago, IL
Alexander L. Paskay	Bkcy.J., Tampa, FL
Joseph Patchan	Esq., Cleveland, OH
Morey L. Sear	Dis.J., New Orleans, LA
Walter Taggart, Reporter	Prof., Villanova, PA

Advisory Committee on Civil Rules

Walter R. Mansfield, Chairman	Sr.Cir.J., New York, NY
David J. Anderson	Justice Dept., Washington,DC
Reece Bader	Esq., San Francisco, CA
William T. Kirby	Esq., Chicago, IL
Arthur L. Liman	Esq., New York, NY
Thomas S. Martin	Esq., Washington, DC
C. A. Muecke	Dis.J., Phoenix, AZ
Louis F. Oberdorfer	Dis.J., Washington, DC
J. Vernon Patrick, Jr.	Esq., Birmingham, AL
Philip Pratt	Dis.J., Detroit, MI
Paul G. Rogers	Esq., Washington, DC
Maurice Rosenberg	Prof., New York, NY
Walter Jay Skinner	Dis.J., Boston, MA
Joseph F. Weis, Jr.	Cir.J., Pittsburgh, PA
Charles E. Wiggins	Esq., Washington, DC
Arthur R. Miller, Reporter	Prof., Cambridge, MA

Advisory Committee on the Criminal Rules

Walter E. Hoffman, Chairman	Sr.Dis.J., Norfolk, VA
Richard A. Green	Esq., Washington, DC
Eugene A. Gordon	Sr.Dis.J., Greeensboro, NC
James F. Hewitt	FPD, San Francisco, CA
William L. Hungate	Dis.J., St. Louis, MO
Frederick B. Lacey	Dis.J., Newark, NJ
Herbert J. Miller	Esq., Washington, DC
Leland C. Nielsen	Dis.J., San Diego, CA
Leon Silverman	Esq., New York, NY
Russell E. Smith	Sr.Dis.J., Missoula, MT
Stephen S. Trott	Justice Dept.,Washington, DC
Malcolm Wilkey	Cir.J., Washington, DC
Wayne LaFave, Reporter	Prof., Champaign, IL

APPENDIX E

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice and procedure and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. Each Advisory Committee shall submit to the Standing Committee its recommendations for rules changes.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary to the Standing Committee, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall acknowledge in writing every written suggestion or recommendation so received and refer all suggestions and recommendations to the appropriate Advisory Committee. The Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

a. An Advisory Committee shall meet at such times and places as the Chairman may authorize.

b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

c. The Advisory Committee shall then consider the draft proposed new rules and rules amendments, together with the Committee Notes, make revisions therein, and submit them to the Standing Committee, or its Chairman, for approval of publication.

4. Publication and Public Hearings

a. When publication is approved, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally, for comment to be made to the Advisory Committee. Distribution shall be as wide as possible and shall include the Chief Justice of the highest court in each State and all individuals or organizations that request copies of proposed rules changes. The Secretary shall also send copies to appropriate legal publishing firms with a request that the proposed rules changes be included in their publications.

b. In the light of the time required to permit full consideration of proposed rule changes by bar associations, circuit judicial conferences and other interested groups, a period of at least six months shall normally be allowed for public comment.

c. An Advisory Committee shall normally conduct public hearings on all proposed rules changes after adequate notice and at such times and places as shall be determined by the Chairman. The proceedings shall be recorded and a transcript shall be prepared for the Committee's use. The transcript shall be available to the public at the Administrative Office of the United States Courts.

d. Exceptions to the time for comment and public hearing requirements of this paragraph may be granted by the Standing Committee, or its Chairman.

5. Subsequent Procedures

a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public comment may be provided.

b. The Secretary to the Standing Committee, in consultation with the Chairman of the Advisory Committee, shall advise every person who has commented on a proposed rules change of the Advisory Committee action thereon.

c. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Mr. KASTENMEIER. Thank you, Judge Gignoux, for a very scholarly and precise statement.

I do get the impression there is very little in the bill that your committee agrees with but I can appreciate that you have, obviously, a rationale for each objection or criticism.

The Supreme Court in legislative veto cases seems to have said that the report and wait provision of the Rules Enabling Acts are a constitutional method of enacting new laws. On the other hand, provisions in U.S.C. 2072 and the proposed 28 U.S.C. 2074 found my bill, H.R. 4144, provides that rules submitted to Congress have the legal effect of superseding preexisting congressional enactments to the contrary.

I guess my question is whether this built-in "trumping" authority is constitutional? That is, can the Congress, in essence, delegate to another authority, whether the Supreme Court or the Judicial Conference, the authority to negate previous actions which have gone through the entire legislative process?

Judge GIGNOUX. Mr. Chairman, I, at the outset, will confess that I do not purport to be a constitutional scholar. And the questions that you raise and others have raised concerning the source of the rulemaking power, whether it is a judicial or a legislative power, is one which I understand has been debated by constitutional scholars for many years. Certainly there is no consensus.

As I indicated, I do not read in *Chadha* any implication that the report and wait procedure prescribed by the present Rules Enabling Acts, and which would be effected by H.R. 4144, runs afoul of the separation of powers doctrine upon which *Chadha* is based.

Chadha, as I read the opinion, held only that the one-house veto provision of the Immigration and Naturalization Act was unconstitutional because Congress can act in the legislative area only by approval of both the House and the Senate, and presentment to the President.

The Federal rules are not promulgated under such a scheme. The proposed rules are forwarded by the Chief Justices to Congress and become effective without more on a specified date unless Congress passes legislation barring their effectiveness. Indeed, this is the procedure which Congress did follow in 1973, I believe it was, in connection with the proposed new evidence rules.

As I read the footnote 9 in Chief Justice Burger's opinion in *Chadha*, he specifically recognizes the validity of this process as having been approved by the Supreme Court in the *Sibbach* case. Nor, Mr. Chairman, do I perceive any serious constitutional objection to Congress delegating the rulemaking power to the judicial branch, reserving, as the Congress does in the present enabling acts, and would in H.R. 4144, the opportunity to review proposed rules changes before they become effective and to pass legislation suspending or modifying any rules which they find to be objectionable.

I am not aware—and again I emphasize I do not purport to be a constitutional scholar—I am not aware that this delegation of the rulemaking power by the Congress has been challenged. And on a practical level I suggest that the accommodation between the Congress and the courts, which has been achieved under the Rules Enabling Acts, and would continue under H.R. 4144, has been effec-

tive. It is a system which has been working and has produced rules of procedure which I believe we all recognize are generally regarded as one of the finest accomplishments of our judicial system; rules which are models that have been adopted by more than two-thirds of our State courts.

Mr. KASTENMEIER. In your view, is it constitutional for the Congress to delegate authority to the courts to create local rules that are inconsistent with the nationally effective rules?

Judge GIGNOUX. Your reference, Mr. Chairman, I assume is stimulated by the proposed amendment to civil rule 83, which, as submitted, would permit the district courts to adopt experimental local rules on a 2-year basis if approved by the Circuit Council.

I say, Mr. Chairman, that proposal has been criticized on both legal and prudential grounds. It was stimulated by Prof. John Franks' article in the ABA Journal a year or so ago suggesting that the district courts might be a laboratory in which experimentation could be conducted, particularly in the discovery area.

In light of what has developed at the public hearings which have been held on the proposed amendments to the civil rules, I anticipate that the civil rules committee may have reservations about this proposed addition to rule 83.

The proposed amendment would authorize local rules that are inconsistent with the Federal rules. This is contrary to the present concept of uniform national Federal rules.

While I cannot speak for all the committees, my personal view is that this proposal probably should not go any further at the present time.

Mr. KASTENMEIER. Even though it might seem that the purpose, that is to experiment and to fill in the gaps, a case could be made for that policywise, yet there does appear to be intrinsic conflict.

Also, I was curious, in recent weeks we have received considerable correspondence relating to some proposed changes, rule 68 of the Rules of Civil Procedure, relating to attorneys' fees. First, I should ask you what is the status of that proposal?

Judge GIGNOUX. Mr. Neuborne, who is going to be testifying this morning, for whom we have the highest regard, was so effective in his presentation at the hearing which was held here in Washington on rule 68, among other proposed rules, that I believe I can assure the chairman and Mr. Neuborne that rule 68 will not be going forward in its present form. An effort may well be made to draft a proposal, which will have to be recirculated for public comment, that will accommodate the interests for which he and others who appeared spoke—that is a rule which will not be in conflict with the policy of Congress as set forth in the so-called fee shifting acts and yet will accomplish the result which we are trying to achieve of encouraging the early settlement of cases in the Federal courts.

Whether something can be drafted, we will not know until the Civil Rules Committee meets in about 3 weeks, I believe, here in Washington. I believe I can assure you that rule 68 in the form submitted will not be going forward.

And that, Mr. Chairman, illustrates the benefit which is being derived from the procedures we have adopted of holding public hearings and receiving written comments on proposed rules changes. The criticisms of proposed rule 68 have persuaded, I feel

confident, the committee members that some other approach is going to be necessary.

Mr. KASTENMEIER. Thank you.

It does seem to raise, at least theoretically, that the question by what authority does the rulemaking process claim to have in connection with and relating to attorneys' fees at the Supreme Court itself does not seem to have as stated in the *Alyeska* case.

Judge GIGNOUX. That is the problem we face. This was a trial balloon, shall we say, that was sent out. A very good argument, a very persuasive argument, was made by Mr. Neuborne and others that rule 68 would modify substantive rights and, even more importantly, might negate congressional policy. In that connection, Mr. Chairman, I was curious as to whether there was a reason for not including in H.R. 4144 the provision which appears in several of the present Enabling Acts to the effect that such rules shall not abridge, enlarge, or modify any substantive right.

We have understood the rules which we were proposing should not, and could not, affect any substantive rights; and whether that was an oversight or a deliberate omission, was somewhat puzzling.

Mr. KASTENMEIER. It is my understanding that it produced a problem distinguishing between substance and procedure for us. We left that unexpressed, at least in what had been traditional terms, I guess. We hope to hear more discussion about that, probably from our next witness about that question.

Judge GIGNOUX. If I might express a personal view, my concern would be that if that provision is not included, some might point to legislative history as indicating that Congress intended rules could affect substantive rights.

Mr. KASTENMEIER. Presumably if left in that fashion, we would have to illuminate through report language the precise implications to be drawn.

One last question. Under current practices of the judiciary, are members of the various advisory committees permitted to vote by proxy or use of surrogates of any form?

Judge GIGNOUX. The answer to that question is "no." I am not aware that any proxy or any surrogate procedure is used. On occasion, when a committee member has been unable to be present, he may have expressed his views on a proposal in a letter and such letters are usually considered.

On another occasion, at the last meeting of the Civil Rules Advisory Committee which I attended, a member of the committee who could not be present had expressed rather strong views on a proposal, and it was simply put over to the next meeting so that he could be heard.

The committee sessions are very, very informal. We have a tape recording and minutes are kept by a member of the committee or by Mr. Spaniol or someone in his office, but the discussions are freewheeling. Frankly, transcripts would be of very little help to anybody, and probably incomprehensible, because frequently a committee member will be discussing a proposal and looking at something on the paper before him, and the transcript will not indicate what that paper is.

Mr. KASTENMEIER. Do the recently promulgated rules deal with voting, prohibitions with respect to voting? Does it deal with that?

Judge GIGNOUX. No.

Mr. KASTENMEIER. It is silent on that question.

I would like to yield to the gentleman from Michigan.

Mr. SAWYER. I have no questions.

Mr. KASTENMEIER. One last question I have then if Mr. Sawyer has no questions is, should the Standing Committee on Rules of Practice and Procedure provide a more active role in reviewing proposed rule changes?

Judge GIGNOUX. I assume you are referring to the proposed language in H.R. 4144, section 2073(b)(2), which provides that the standing committee shall review each recommendation for consistency with other existing rules, and recommend such changes may be necessary to maintain consistency and otherwise promote the interest of justice.

The standing committee's review of proposed rules sent forward by an advisory committee has embraced more than reviewing those rules for consistency.

The standing committee has reviewed the policy and the draftsmanship of every proposed rules change. When the standing committee has deemed a substantial change is required, the proposal is remanded to the advisory committee.

I suggest that perhaps that section of H.R. 4144 might make it clear that the standing committee is not limited to simply reviewing proposed rules changes for consistency.

If, for example, rule 68 in its present form were to come forward to the standing committee from the advisory committee—and I hasten to assure Mr. Neuborne that I don't think it will—the standing committee would then make a policy decision and might well reject it and send it back to the advisory committee because in our view it is too substantive.

Mr. KASTENMEIER. As you know, it has been suggested by some that the standing committee serve as a backstop and pick a more active role, retain a reporter, and in the process to, among other things, preventing drafting errors and so forth, quite apart from the policy questions.

Judge GIGNOUX. We have had on our agenda for several years the question of whether we should request authorization for a reporter. To date, we have felt that we really could not justify one. I sense that we may, in reviewing our current procedures, deem that we now should have the assistance of a reporter.

When the advisory committees present rules changes to the standing committee, the advisory committee chairman and the reporter, who is a distinguished academic, is present. They are usually, between them, able to answer any questions that we have.

As we go into this local rules project, since that cuts across all the rules, civil, criminal, appellate, and bankruptcy, it may well be that we will be requesting a reporter for the standing committee, who can coordinate the research that will have to be done.

Mr. KASTENMEIER. The committee thanks you very much for your appearance and your advice to us today, Judge Gignoux, and the fact that you are communicating the views of your committee on this important question. I will certainly encourage every member of the subcommittee to read your prepared statement. It is good to have you back again. Thank you, sir.

Judge GIGNOUX. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Good to see your colleagues, Mr. Spainol and Mr. Beck.

Judge GIGNOUX. Thank you.

Mr. KASTENMEIER. Our next witnesses will testify as a panel. The first panel member is Prof. Burt Neuborne. Professor Neuborne is the legal director of the American Civil Liberties Union. Professor Neuborne has had a long distinguished career.

The second member of the panel is Richard Schmidt of the Washington firm of Cohn & Marks. Mr. Schmidt is an old friend of the subcommittee having testified before us on behalf of numerous organizations in the past, mostly on matters relating to the press and first amendment questions.

He is today appearing before us representing the American Society of Newspaper Editors.

Gentlemen, we received copies of your written statements and, without objection, they will be made a part of the record, and you may proceed as you wish. Professor Neuborne, perhaps you could go first.

TESTIMONY OF RICHARD M. SCHMIDT, JR., ESQ., PARTNER, LAW FIRM OF COHN & MARKS, WASHINGTON, DC, ON BEHALF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND BURT NEUBORNE, LEGAL DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. SCHMIDT. Professor Neuborne has suggested that I go first.

Mr. KASTENMEIER. All right, Mr. Schmidt, we will be very pleased to hear from you.

Mr. SCHMIDT. Mr. Chairman, thank you for the opportunity to appear here today to testify concerning H.R. 4144. I am representing the American Society of Newspaper Editors which is a nationwide professional organization of almost 900 persons who hold positions as directing editors of daily newspapers throughout the United States.

The board, at its meeting in Lexington, KY, on October 30, 1983, authorized me to appear today and make this statement concerning H.R. 4144. We are limiting our comments to that provision of H.R. 4144 which states that:

> Each meeting for the transaction of business under this chapter by any committee appointed under subsection (a) of this section shall be open to the public, except when the body so meeting, in open session and with a majority present, determines that all or part of the remainder of the meeting on that day shall be closed to the public. A transcript of such meeting in open session shall be maintained by the committee and made available to the public.

I am sorry to take issue with Judge Gignoux. I wish to state for the record I think is one of the finest Federal judges we have had in the history of our U.S. judicial system. He is a man of intelligence, integrity, and compassion, but we simply cannot agree that there is any valid purpose in holding these sessions behind closed doors.

We are talking, after all, about matters or procedure. We are not asking that the public be present to monitor the judicial decisionmaking process, but simply and purely matters of procedure.

ASNE finds itself in agreement with the statements made before this committee last April by Alan Morrison, director of the Public Citizen Litigation Group, and James Holderman on behalf of the American Bar Association, concerning these proceedings.

As I stated in my prepared statement, Mr. Morrison did refer to the experiences Congress has had in its markup sessions since they have passed what is known as the congressional Sunshine Act. As he stated:

> It seems to me that those experiences have taught us a fundamental point: that open mark-ups do not significantly interfere with the operation of the committee. There is no reason not to apply that to these committees as well.

After all, they are acting in a quasi-legislative capacity and as he states, as the Congress and the executive branch committees and agencies have learned to operate in the sunshine, so the various committees would learn to operate in the sunshine here as well.

The American Bar statement, which I think was a good one, referred to the public's belief that there is a need for openness for all institutions of Government was heightened by the Watergate incident. So many of the proceedings that surrounded that incident occurred in an air of secrecy that the public became naturally suspicious of any proceeding conducted outside of the public's view.

In the public's eyes, the judiciary was the symbol of fairness in the Watergate incident. For the judiciary to compel disclosure in so many instances in those cases, and yet to foreclose the public's access to its own rulemaking proceedings, has the potential of doing some violence to the public's image of our judicial system.

And as we state, perhaps the drafters of this report had a mind a statement by the Chief Justice in *Richmond Newspapers* v. *Virginia* decided in 1980:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

We think that H.R. 4144 appears to recognize this concept and we submit there has been no showing to the contrary that the committee's need to work behind closed doors when they are dealing with judicial procedures.

If, indeed, they find it so sensitive and so dangerous to the public good to operate in sunshine, they may, by a majority vote, choose to close all or part of the remainder of the meeting on that particular day.

In our opinion, we think this bill would be greatly improved if the provision which now reads that "a transcript of each such meeting in open session shall be maintained by the committee and made available to the public" were amended to read: "A transcript of each such meeting shall be maintained by the committee and made available to the public."

I appreciate Judge Gignoux's remark about the apparent chaos that occurs when the committees meet, and the random and informal proceedings might make it a bit difficult for a reporter to transcribe it. Nevertheless, we think it can be done.

Also as it is presently drafted, the committee can simply, by a majority vote of those present, vote to close the session for that day to the public, without giving any reasons—and we are right back to operations behind closed doors.

We think that this should be clarified and they should state the reasons for closing the meeting if this is maintained in the bill.

We feel honestly that such public access will help the public understand the operations of the judiciary and will aid public acceptance in support of the judiciary's actions.

We urge you to not only keep the openness provision in the bill but to strengthen it in the way that we have mentioned.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Schmidt.

[The statement of Mr. Schmidt follows:]

TESTIMONY

OF

RICHARD M. SCHMIDT, JR.,

General Counsel,

American Society of Newspaper Editors,

before the

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,

AND THE ADMINISTRATION OF JUSTICE

of the

COMMITTEE OF THE JUDICIARY,

HOUSE OF REPRESENTATIVES,

March 1, 1984

Mr. Chairman, Members of the Committee: I am Richard M. Schmidt, Jr., a partner in the law firm of Cohn and Marks in Washington, D.C., and General Counsel of the American Society of Newspaper Editors. I appreciate the opportunity to appear here today and testify concerning H.R. 4144.

The American Society of Newspaper Editors (ASNE) is a nationwide, professional organization of almost 900 persons who hold positions as directing editors of daily newspapers throughout the United States.

The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity

and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and free press in the service of the American people.

The ASNE Board of Directors, at its meeting in Lexington, Kentucky on October 30, 1983 authorized me to appear today and make this statement concerning H.R. 4144.

ASNE will limit its comments to that provision of H.R. 4144 which states: "(c)(1) Each meeting for the trans action of business under this chapter by any committee appointed under subsection (a) of this section shall be open to the public, except when the body so meeting, in open session and with a majority present, determines that all or part of the remainder of the meeting on that day shall be closed to the public. A transcript of such meeting in open session shall be maintained by the committee and made available to the public."

Mr. Chairman and Members of the Committee, I indeed regret that we take a position counter to that of the Honorable Edward T. Gignoux in his testimony before this committee on April 21, 1983, when he stated: "Suggestions have been made that all Committee meetings should be public. I question whether it is either wise or necessary to have the public present at drafting sessions. I am apprehensive that

public meetings will inhibit the kind of frank and candid discussion of controversial proposals possible only within a small deliberative group. It would be impossible to formulate rule changes without such frank discussions. In addition, I doubt that the public generally, or even members of the Bar, would derive significant benefit from 'monitoring' these discussions."

I wish to state for the record that I think Judge Edward Gignoux is one of the finest Federal judges that we have had in the history of our United States judicial system. He is a man of intelligence, integrity, and compassion; but ASNE cannot agree that there is any valid purpose in holding these sessions behind closed doors.

We are, after all, talking about matters of procedure. We are not asking for the public to be present to monitor the judicial decision-making process, but simply and purely matters of procedure.

ASNE finds itself in agreement with the statements made before this committee last April by Mr. Alan Morrison, director of the Public Citizen Litigation Group, and James Holderman on behalf of the American Bar Association, concerning the openness of these proceedings.

Mr. Morrison, you will remember, referred to the experiences under the government in the Sunshine Act and the changes that Congress made several years ago to hold open

mark-up sessions. As Mr. Morrison stated: "It seems to me that those experiences have taught us a fundamental point: That open mark-ups do not significantly interfere with the operation of the committee. There is no reason not to apply that in these committees as well."

As Mr. Morrison pointed out, these committees are acting in a quasi-legislative capacity and further states: "It seems to me that just as other bodies have learned to operate in the sunshine, so the various committees would learn to operate in the sunshine here as well."

We also feel that the American Bar Association's statement concerning the openness of proceedings is well worth reiterating. The ABA stated:

> "The American Bar Association policy also contains a number of recommendations intended to promote 'openness' in the judicial rulemaking process. Creating an atmosphere of 'openness' is important in shaping the public perception of the judiciary as an institution of our government. The public's belief that there is a need for openness for all institutions of government was heightened by the 'Watergate' incidents. So many of the proceedings that surrounded that incident occurred in an air of secrecy that the public became naturally suspicious of any proceeding conducted outside the view of the public. In the public's eyes, the judiciary was the symbol of fairness in the 'Watergate' incidents. For the judiciary to have compelled disclosure in so many instances in those cases, and yet to foreclose the public's access to its own rule-making proceedings, has the

> potential of doing some violence to the public's image of our judicial system."

Perhaps the drafters of this report had in mind a statement that appeared in the opinion of Mr. Chief Justice Burger in the Richmond Newspapers v. Virginia case decided by the Supreme Court in 1980, where the Chief Justice stated:

> "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

As Justice Brandeis stated: "Sunshine is the best disinfectant."

The strength of our democracy is in the free flow of information, which is guaranteed by the First Amendment.

H.R. 4144 appears to recognize this concept and we submit that there has been no showing to the contrary that committees need to work behind closed doors when they are dealing with judicial procedures. If indeed they find it so sensitive and so dangerous to the public good to operate in the sunshine, they may by majority vote present close all or part of the remainder of the meeting on that particular day. In our opinion, H.R. 4144 would be greatly improved if the provision which reads, "a transcript of each such meeting in open session shall be maintained by the committee and made available to the public" were amended to read: "A transcript of each such meeting shall be maintained by the committee and made available to the public."

In addition, there is no provision for the committee giving reasons for the need to have a closed meeting. We suggest that this needs to be rectified. As H.R. 4144 is presently drafted, the committee can simply meet, a majority of those present can vote to close the rest of the session for that day to the public, without giving any reasons whatsoever, and we're right back to the operations behind closed doors. As drafted, a transcript of only those portions which occur in the open session shall be maintained by the committee, so no one will ever know what went on behind the closed doors.

We appreciate the intent behind this provision of H.R. 4144, but submit that it needs clarification to strengthen the rights of public access.

Such public access will help the public understand the operations of the judiciary and will aid public acceptance and support of the judiciary.

Mr. KASTENMEIER. Here I should pursue this with you before reaching Professor Neuborne since it is pretty well focused on a single issue here.

What has been the experience, if you know, of the organization you represent with the openness of the rulemaking process, as your editors or their reporters have experienced at ASNE, if you know? What criticism do they have?

Mr. SCHMIDT. You mean insofar as it concerns the judiciary?

Mr. KASTENMEIER. Yes.

Mr. SCHMIDT. We have appeared before advisory committees of the Judicial Conference as we have been alerted by reporters who have been covering the reporters who traditionally cover the Supreme Court and the Federal courts will also monitor the proceedings of the Judicial Conference.

We had experience a couple of years ago when they proposed to modify rule 5(e) concerning discovery materials that had to be filed and were open to public inspection. It really struck us as rather strange that when we met with them they had no discussion whatsoever, no response, they listened to us, and then in effect went into an executive session; and informed us later as to what they had decided without giving reasons.

I think it would have been very helpful had the press, as representatives of the public, been able to listen to the discussion and see why there were those who wished to close these particular—or keep these documents out the public record, and those who wanted it on the record.

I fail to see where it endangered in any way the judicial process. I think the type of matters they discuss is not going to entail a huge press delegation listening and watching; but they will be covered, and we do have an interest in it.

Mr. KASTENMEIER. Your recommendation of the bill, as I understand it, is that instead of just the availability of transcripts of open meetings, your position is that they may indeed vote to go into closed meetings——

Mr. SCHMIDT. Right.

Mr. KASTENMEIER [continuing]. But if they do they should maintain a transcript of those closed meetings, and those transcripts in due course should be available; is that correct?

Mr. SCHMIDT. Yes, we see no reason why they shouldn't.

Mr. KASTENMEIER. What reasons would you see as justifying a closed meeting as a matter of policy?

Mr. SCHMIDT. Frankly, having participated on a State level on this sort of matter and having appeared before the Judicial Conference advisory committee, I would find it very difficult to imagine a situation where they would really want to go into a closed session. It is much like an appearance before this committee—they are laying bear all of their reasons and their ideas and concepts, and I don't know what we are trying to hide.

Mr. KASTENMEIER. Would you not agree, though, that discussions which take place in private, perhaps would be more candid and possibly even more useful in certain sessions?

Mr. SCHMIDT. Perhaps. I suppose I could imagine a situation where a particular Federal judge was maybe going off the reservation as far as following the rules and somebody wanted to discuss

that—it would be a matter of personnel, along that lines which that a judge had shown erratic behavior in his interpretation of the rules. At that point somebody might want to say let's go into executive session, because they are talking about somebody's erratic behavior, and they don't want to put that out on public record. That kind of thing I can see, but beyond that I find it difficult to envision anything that should be kept secret.

Mr. KASTENMEIER. Thank you very much.

Mr. SCHMIDT. Thank you for the opportunity to appear and going on the record on behalf of the ASNE.

Mr. KASTENMEIER. Professor Neuborne.

Mr. NEUBORNE. Representative Kastenmeier, it is a pleasure to be here to address the subcommittee.

Let me add my voice to that of Mr. Schmidt and express my admiration for Judge Gignoux's contribution to the judiciary. For as long as I have been practicing law, Judge Gignoux has been the model of what we all think the Federal district judge should be and the judicial system and the country owes him a great debt of gratitude for a remarkable legal career.

I thought he had better judgment than to find me persuasive but I suppose that everybody is entitled to one fault.

I hope that I can discuss with you this morning what I think is an emerging problem that has just begun to be perceived, and it is the interaction between the Supreme Court's *Chadha* decision last term and the problems that are inherent in the Rules Enabling Act.

If I could, what I propose to do is very briefly review what the pre-*Chadha* process was and then discuss what impact the *Chadha* case has on that process.

Prior to the *Chadha* decision, I think the general assumption was that the Federal Rules of Civil Procedure had two sources of justification.

The first source of power, the first source of justification, was the inherent power of a court to promulgate rules of procedure.

I think most people in the field agree that courts do have some inherent power, even if there were no congressional authorization, to make rules governing the way they were going to operate on a housekeeping basis. The Federal Rules derive authority first from that inherent power and; second, they derived authority from the fact that Congress had delegated legislative power to the Supreme Court and to the Advisory Committee which was being exercised in a way which would then be subject to a two-House veto. The combined effect of the legislative sanction that derived from the two-House veto and the inherent judicial power to make rules made it unnecessary, really, to ask whether a particular rule lay within the inherent power of the court or whether it was something that had to be enacted by Congress because there was an overlap, you had both judicial and legislative sanction.

The decision in the *Chadha* case suggests, however, and I think more than suggests, it demands, that to the extent an act requires legislative sanction in our system to the extent that something must be done by a legislature as opposed to some other body—there is only one way that action can acquire article I sanction—and that is by passage by both Houses, and presentment to the President.

Therefore, the legislative sanction to the Federal rules was removed by the *Chadha* decision. Their validity now flows from the fact that they are within the inherent power of the judiciary to promulgate, subject, of course, to Congress' determination that before they go into effect Congress wants a chance to look at them for a while to see whether legislation should be enacted.

I am not suggesting the layover provision is unconstitutional. I agree with Judge Gignoux, that it is perfectly within Congress' power to say to the courts, yes, you have the power to promulgate rules, and this is the way you should do it. And once you promulgate the rules, they will lay on the table in Congress for a particular period of time, and if we then choose to trump those rules by legislative activity, we may do so.

The problem emerges, though, because there is, I think, clear consensus, and especially after the *Alyeska* case, that there are two types of rules. One type of rule lies within the inherent traditional power of the court to promulgate. Those are the housekeeping rules, the rules that don't really affect people's rights very much. They tell you what time the court opens; tell you, perhaps, how many days you have to file which piece of paper; how long to take to answer a motion. Those kinds of rules, I think, continue to lie within the inherent judicial power to promulgate. And I don't think there is any question as to their validity.

But there is another whole species of rules; rules like fee-shifting rules that the Supreme Court in *Alyeska* held had to be legislatively determined. Other candidates for that type of rule, for example, would be class action rules; rules governing the imposition of sanctions for bad lawyering; rules governing the shifting of costs; rules governing radical changes in the discovery process, which will in effect determine what class of litigant has access to court, who can prove what, and how.

Those kinds of rules go far beyond the notion of housekeeping; they dramatically affect the substantive rights of all Americans—and they determine in fact the quality of justice that the Federal courts will dispense.

I think after *Chadha* there is a very serious question as to whether or not those rules lie within the inherent power of courts to promulgate. If they do not, if they do not lie within the inherent power of courts to promulgate—and this is a personal opinion, of course—I don't see where in the process there is an infusion of legislative power, an infusion of legislative sanction, that would make those rules valid and binding, because the two-house veto provision and the layover provision under *Chadha* is not sufficient to constitute legislative activity.

So that to the extent that a Federal rule genuinely affects people's rights in the way that the fee-shifting rules were held to affect their rights in *Alyeska*, they require a degree of legislative sanction. And in the current Rules Enabling Act process, there is no point in that process in which that sanction can be introduced.

So I think we may well be sitting on a procedural time bomb. We may be sitting on a situation where significant segments of the Federal rules are vulnerable to attack because they have not been promulgated and passed in accordance with legislative sanctions. And, frankly, that is a serious practical problem for the courts.

The academic problem and the analytical problem, of course, is to try to distinguish between those rules which are truly procedural and, therefore, lie within the housekeeping power of courts and those rules which are truly substantive and require legislative sanction.

[The statement of Mr. Neuborne follows:]

Testimony of Burt Neuborne

Legal Director, American Civil Liberties Union

before the

Subcommittee on Courts, Civil Liberties and the Administration of Justice of the United States House of Representatives, Committee on the Judiciary

March 1, 1984
Washington, D.C.

Testimony of Burt Neuborne before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the United States House of Representatives, Committee on the Judiciary

Rep. Kastenmeier and Members of the Subcommittee:

Thank you for the cpportunity to express my views on what I believe is a serious flaw in the current process governing the adoption of Rules of Procedure for the Federal courts.

The Rules Enabling Act of 1934 establishes the ground rules for adopting Rules of Procedure for the Federal courts. As originally enacted, the Act contemplated a broad delegation of authority to the Federal judiciary (in the form of the Supreme Court and an advisory committee) to promulgate Rules of Procedure, subject only to an admonition to refrain from modifying substantive rights, especially in diversity cases, and a requirement that proposed rules be subject to a two-house veto prior to promulgation.

A half-century of law students, to say nothing of the Supreme Court, have struggled unsuccessfully with the question of when a rule is procedural and when it affects substantive rights. However, with the Supreme Court's recent decision in Chadha v. I.N.S., __ U.S. __ (1983), invalidating the legislative veto as a source of legislative authority, a related but novel complexity has been introduced into the Rules process which I believe requires prompt legislative attention. Prior to Chadha, the validity of a Federal rule was traceable to the combined force of the inherent judicial power to make rules and the legislative sanction derived from the failure of both houses to veto the proposed Rule. Since the Rules were thought to enjoy both judicial and legislative sanction, it was unnecessary to decide whether a particular rule derived from one or

both sources of power.

After Chadha, however, it seems clear that the two-house veto aspect of the Rules Enabling Act cannot clothe a Federal rule with legislative sanction. Only affirmative passage by both houses and presentment to the President can, under Chadha, vest an enactment with Article I legislative sanction. Thus, only those Federal rules which lie within the inherent power of the judiciary to promulgate can be adopted pursuant to the existing process. Rules that go beyond judicial housekeeping to touch substantive rights must be enacted pursuant to the Article I process. Unfortunately, however, very few guidelines exist to determine whether a rule is sufficiently mundane to fall within inherent judicial power or sufficiently far-reaching to require legislative enactment.

For example, are rules governing class actions or sanctions for bad lawyering within the inherent power of the judiciary or must they be adopted by the legislature? The Supreme Court has already held that rules governing fee shifting are so important that they cannot be imposed unilaterally by the courts, but must be enacted by the legislature. Aleyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Unfortunately, the only guide to whether a rule is "judicial" or "legislative" is the less than satisfactory line between substance and procedure used to determine whether or not a federal rule should operate in a diversity case under Erie RR v. Tompkins, 304 U.S. 64 (1938). Unlike the Erie cases, however, where the choice is between a federal or a state rule, the consequences of the post-Chadha dilemma are far more dramatic, since if a federal rule is invalid

because it lies beyond the inherent power of a court to promulgate, there will often be no rule to serve as a backstop.

As an illustration of the post-Chadha dilemma, I have annexed my testimony before the Advisory Committee on the Federal Rules concerning a proposed amendment to Rule 68, which appears to go far beyond inherent judicial power and which, I believe, must receive Article I sanction in order to be valid

Unless legislative action is taken, many of the Federal rules appear vulnerable to expensive and unproductive attack. In addition, attempts to modify or reform existing rules will become mired in a debate as to whether they require legislative sanction.

Ideally, legislative action would differentiate between rules subject to judicial promulgation and rules which require affirmative legislative sanction. Frankly, however, I doubt that Congress would be any better than the Supreme Court at drawing the line between substance and procedure. Since the line is so difficult to draw, I believe that the only workable result is to require all Federal rules to be affirmatively approved by Congress and submitted to the President for signature. While such a process would be somewhat more cumbersome than the present process, it would be preferable for several reasons.

First, it would submit Rules which impact dramatically on the general quality of justice and the particular rights of individuals to the democratic process. State rules of procedure are subjected to democratic control. No basis exists to exempt federal rules from the same democratic check.

Second, it would make it unnecessary to distinguish between "judicial" and "legislative" rules, since all rules would

possess a clear legislative imprimatur.

Third, it might decrease the litigation over whether federal or state rules govern in a diversity case. Where a Federal rule possesses a clear legislative sanction, the analysis might shift from the unproductive and unanswerable question of "substance v. procedure" to the more straightforward question of whether the statute was within the power of Congress.

In any event, as the controversy over Rule 68 demonstrates, in a post-Chadha world, the current Rules Enabling Act process does not provide an adequate framework for the ongoing review and reform of the Federal rules. Congress must play a far greater role.

Statement of Burt Neuborne

Legal Director, American Civil Liberties Union

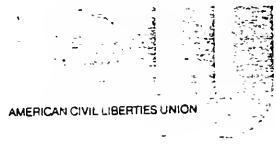
before the

Committee on Rules of Practice and Procedure of the

Judicial Conference of the United States

Concerning Proposed Rules 68 and 83

January 18, 1984
Washington, D.C.



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Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Burt Neuborne
LEGAL DIRECTOR

January 12, 1984

Members of the Committee:

Thank you for this opportunity to express the views of the American Civil Liberties Union on the propriety of proposed Rules 68 and 83. While I am deeply appreciative of the effort which the Committee has expended in proposing these rules and while I am certain that they are intended to deal with the Committee's perception of a serious problem in the administration of justice, I fear that the Committee has not considered the dramatic impact which the Rules -- especially proposed Rule 68 -- would have on lawyers engaged in defending constitutional rights and enforcing acts of Congress which were designed to implement the Fourteenth Amendment. Put baldly, I believe that Rule 68, if adopted in its current form, would impact with disastrous force on civil rights lawyers and would have, I believe, the wholly unintended effect of dramatically altering the balance of power in constitutional cases.

With the Committee's permission, I propose to divide my remarks into three segments: (1) A brief description of the way Rule 68 is likely to affect civil rights litigation, (2) a plea that such an effect be avoided; and (3) a suggestion

that the Committee lacks the power to impose such an effect in the absence of explicit legislative authorization.

A. The Effect of Rule 68 on Civil Rights Practice

The basic change effected by Rule 68 in the context of civil rights litigation is to make a plaintiff liable for a substantial proportion of a defendant's attorneys fees and costs if the civil rights plaintiff rejects an offer of settlement and subsequently recovers a lesser amount after trial. Thus, if a civil rights lawyer guesses wrong on the law or the facts -- or the judge -- he or she exposes a generally impecunious client to a potentially ruinous personal liability. Having been a plaintiff's lawyer in a civil rights setting on more than one occasion, I can assure the Committee that I often harbor serious doubts about the law, the facts and the judge. I do the best I can in determining what a fair settlement would be in those cases, discounting the plaintiff's claim by the degree of uncertainty involved. However, faced with an offer of settlement under Rule 68, my thought processes would be radically altered. Given the vulnerability of civil rights clients to even a small award of fees or costs against them, I would be forced to reduce my estimate of an acceptable settlement to reflect the enormous risk my client would run if the offer were rejected. Indeed, once I informed my clients of the risk they ran under proposed Rule 68, I am absolutely certain that the vast bulk of civil rights plaintiffs would be

too frightened to do anything else but accept the offer. The net affect of Rule 68, therefore, will be to make defendants the absolute arbiter of the outcome of most civil rights cases. Whenever a conscientious lawyer for the plaintiff harbors any doubt about a case's outcome -- and in the uncertain world of civil rights litigation, that is always -- counsel could not, in good faith, risk poor and vulnerable clients by exposing them to personal liability even though counsel believes that the settlement offer is unreasonably low. If Rule 68 is enacted in its proposed form, it would be as if Congress passed the following statute:

> In any civil rights case involving poor plaintiffs, the claim shall be worth whatever the defendant says it is.

B. Rule 68 Would Implement Unwise Policy in the Area of Civil Rights Litigation

I do not believe that the Committee wishes or intends to place civil rights plaintiffs at the mercy of defendants. I believe that the rule was conceived as a device to encourage settlement between substantial litigants of roughly equal stature. In the context of substantial commercial litigation involving entities with equal bargaining power and economic resources, Rule 68 may make a good deal of sense. Frankly, large commercial enterprises have not fallen over each other in attempting to retain me, so I cannot hazard a guess about the value of Rule 68 in a commercial litigation context. I can, however, hazard a strong prediction that, in the civil

rights area, Rule 68 will be a plaintiff's disaster. It will permit defendants to place inexorable pressure on a poor plaintiff to accept whatever settlement seems reasonable to defendants. While the proposed rule does provide judicial discretion to limit the fee award, at the point at which counsel must advise a client with respect to a settlement offer, it is the potential liability that must be considered. Thus, for the very reasons that induced the Committee to exclude class actions from the Rule, a broader exception for civil rights litigation should be recognized.

As a final policy point, I question whether the Rule will have the desired effect of conserving judicial resources. A Rule aimed at frivolous and vexatious conduct might well conserve resources, but a rule which imposes a drastic penalty on a client because a lawyer guesses wrong in valuing a case will spawn enormous volumes of collateral litigation. The net result will be to embroil the courts in litigation over collateral issues without zeroing in on the real evil -- the frivolous or vexatious conduct of litigation. Merely because a judge or a jury disagrees with a lawyer about the value or outcome of a case is not conclusive -- or even presumptive -- evidence that the lawyer acted frivolously or vexatiously. I have lost cases that I believe I should have won. I have recovered less in others than I believe justified. It would be dreadfully unfair in such cases to penalize me or my client merely because my good faith estimate differed from that of a judge. It would be doubly unfair to do so in civil rights cases involving poor clients seeking to vindicate

constitutional rights.

C. The Power of the Committee to Effect Such a Drastic Change in the Balance of Power Between Civil Rights Plaintiffs and Defendants

I harbor serious doubts about the power of the courts to promulgate proposed Rule 68 under the authority of the Rules Enabling Act. Since the effect of Rule 68 on the substantive rights of civil rights litigants would be enormous, I believe that such a Rule must be enacted pursuant to the legislative process. While I believe that courts retain, even after INS v. Chadha, _ U.S._ (1983), a degree of inherent authority to punish frivolous or vexatious litigation, I do not believe, especially in light of Aleyeska Pipelines Co. v. Wilderness Society, 421 U.S. 240 (1975), that courts possess inherent authority to punish lawyers and clients for guessing wrong about the value of their cases. If we are to adopt a variant of the English fee-shifting practice, it must be by plenary legislation, especially in areas like civil rights litigation where Congress has already enunciated a legislative policy. Chesny v. Marek, __ F.2d__ (7th Cir. 1983). See Hughes v. Rowe, 449 U.S. 5, 14-15 (1980); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

1. The Nature of the Judicial Power Concerning Fee-Shifting

In Aleyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court ruled that courts lack inherent authority to force a losing party to pay the attorneys fees of the winner. If, the Supreme Court held, the English rule

on fees is to be adopted in the United States, it must be pursuant to legislation. On the other hand, it is clear that the courts possess inherent authority to force litigants to bear the cost of bad-faith, frivolous on vexatious litigation. Christiansburg Garment Co. v. EEOC, supra.

Thus, were Rule 68 couched in terms of bad faith, vexatious or frivolous acts, it would be well within the court's inherent power. However, as the Committee undoubtedly recognizes, Rule 68 is considerably broader. It applies whenever an attorney guesses wrong about the value of a case. In effect, it equates being wrong with being vexatious and frivolous. Such a linkage, which adopts the English practice whenever a settlement offer is rejected, goes far beyond the court's inherent authority and invades the province of the legislature. As the Supreme Court noted in Aleyeska Pipeline, a fee-shifting decision dramatically impacts on the substantive rights of the parties. Such an observation is particularly important in the context of civil rights litigation, where the spectre of a fee award places the plaintiff under enormous pressure to accept any settlement offered by a defendant. Thus, I do not believe that a persuasive argument can be made for resting Rule 68 on the inherent power of the court to deal with bad faith, frivolous or vexatious conduct.

2. The Effect of the Rules Enabling Act on the Power to Promulgate Rule 68

Prior to the Supreme Court's decision in INS v. Chadha, __ U.S. __ (1983), it might have been argued that, whatever

the inherent power of the courts to promulgate Rule 68, the Rules Enabling Act permitted its promulgation pursuant to a joint exercise of judicial and legislative authority. However, if Rule 68 is beyond the court's inherent authority, it may, after Chadha, be adopted only by legislative action. As Chadha unequivocally held, executive promulgation subject to legislative veto does not constitute legislative activity within the meaning of Article I of the Constitution. If Rule 68 is beyond the inherent power of the judiciary to promulgate, it may be adopted only pursuant to the Article I legislative process which requires affirmative passage by both Houses of Congress and submission to the President for possible veto. In light of the Supreme Court's holding in Aleyeska Pipeline; the degree to which Rule 68 impacts on the enjoyment of substantive rights of paramount importance; and the fact that it clearly applies to all cases, not merely bad faith, vexatious or frivolous settings, the Rule, I believe, is a clear exercise of legislative authority.

3. The Impact of Existing Congressional Policy on Fee Awards in Civil Rights Cases

Whatever one might say about the power to promulgate Rule 68 in a vacuum, it is clear that the impact of Rule 68 is to reverse a series of Congressional judgments about fee-allocation in civil rights cases. Congress, recognizing the fact that most plaintiffs in civil rights cases were economically unable to afford counsel, provided that attorneys fees in successful cases should ordinarily be borne by the

defendant. See generally Hensley v. Eckerhart, __ U.S. __ (1983). Congress also provided that unsuccessful civil rights plaintiffs should bear a defendant's attorneys fees only when the litigation was conducted in bad faith or was frivolous or vexatious. Merely guessing wrong about a given case does not constitute grounds for an award of fees against a losing plaintiff in a civil rights case. Christiansburg Garment Co. v. EEOC, supra.

However, the effect of Rule 68 would be to reverse the congressional judgment by imposing fees on a civil rights plaintiff, not because of bad faith, frivolous or vexatious activity, but merely because the party guessed wrong about the value of the case. In Chesny v. Marek, __ F.2d __ (7th Cir. 1983), a panel of the Seventh Circuit speaking through Judge Posner ruled that the current Rule 68 could not be applied to prevent an award of fees authorized by 42 U.S. § 1988. Proposed Rule 68 goes even further and not only denies § 1988 fees to a prevailing civil rights plaintiff, but actually stands the congressional judgment on its head by forcing a successful civil rights plaintiff to pay a portion of the defendant's attorneys fees. Where such a result flows from bad faith or vexatious conduct, it is unobjectionable. But where it flows from a simple miscalculation, it is both dreadful public policy and far beyond the inherent power of a court to adopt.

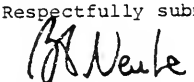
My concerns with Rule 83 flow from the fact that all litigators know the impact which procedural rules can have on

the enjoyment of substantive rights. Proposed Rule 68 is a perfect example. If Congress wished to delegate plenary authority to each District Judge to promulgate her or his own rules, it could have done so. Congress never thought seriously of doing so because it realized that procedural uniformity was integral to the conception of a unified federal system. Were procedures to vary widely from District to District, the accident of geography would, often, play a significant role in the outcome of a lawsuit. Moreover, given the impact which procedure may have on substance and the genuinely thin constitutional ice on which the entire rule making process now stands in light of Chadha, it is inappropriate to invite an avalanche of experimental rules with unknown and unknowable impact promulgated by differing judges under differing procedures. Once Chadha removed the legislative-veto crutch from the Rules Enabling Act process, it is clear that the validity of the entire rule making process turns on an analysis of the inherent power of courts to promulgate rules of procedure. Until guidelines emerge which help define the scope of appropriate rulemaking authority, it is, I believe, plainly wrong to engage in a radical experiment in decentralization.

Having ungraciously harangued the Committee on what I perceive as the Rules' shortcomings, let me hasten to add that I am grateful for your efforts and fully supportive of your goals. With respect, may I suggest that a fuller participation by the Civil Rights bar in the deliberations of the Advisory Committee would prove helpful in preventing future misunderstandings. I am not personally acquainted with all

of the distinguished members of the Committee, but I do not believe that an active civil rights lawyer has served on the Committee in recent years. Nor do I believe that the Committee held open hearings prior to drafting the proposed Rules. While today's opportunity to comment on the proposed rules is, of course, welcome, it is hardly a substitute for the close cooperation that should ideally have taken place. In all candor, I do not believe that proposed Rule 68 would have been promulgated in its present form had civil rights lawyers who must practice under it had an opportunity to participate in the Committee's deliberations.

Respectfully submitted,



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Mr. KASTENMEIER. If they are substantive and the Congress fails to trump them, is it your view they can be challenged?

Mr. NEUBORNE. I think so. I have a tendency to overstate, but I believe that there is no doubt that if those rules do not receive legislative sanction, they are vulnerable to attack.

The statement that Judge Gignoux was kind enough to refer to before the advisory committee was a statement which I have annexed to my written statement for the committee's reading—my suggestion that if rule 68 were passed in the form that it was proposed, that rule 68 would have been invalid and subject to attack in the courts. And that, of course, would create a very serious embarrassment. Because to the extent the Supreme Court is itself involved in the promulgation of the rule, the Supreme Court will then be asked at some stage in the litigation to pass on the validity of a rule which it was engaged in promulgated. That is why the wisdom of the provision in your bill removing the court from the promulgation process is terribly important. If these issues are going to require judicial resolution, I think it is very important that the appearance of justice be maintained and that the court be removed from that process.

Mr. KASTENMEIER. Is it possible, other than housekeeping rules, and outcome-affecting rules, are there any other rules that don't discretely fall into one of those two classes?

Mr. NEUBORNE. Yes, I think those of us who teach first-year procedure are condemned to come back to *Erie* v. *Tompkins* over and over again in our lives; it is a kind of purgatory.

The truth is, I think it is probably simplistic to try to say that there are two categories: outcome determinative rules which are therefore substantive; and housekeeping rules which are therefore procedural.

It is much closer to a spectrum of rules that start from the easy case of "what time does the court open" to the really hard case of "fining somebody for turning down settlement." Along that spectrum you run from clearly housekeeping rules to clearly substantive rules.

Now, where the line is in the middle has been one of the most difficult lines for the Supreme Court to draw. They have not been successful in enunciating a clear line that will enable district judges to know, for example, in a diversity case whether to apply the Federal or the State rule.

The question they ask in all those cases is, is it procedural or is it substantive? I think any Federal litigator will tell you that there simply is no certain compass to make a determination as to which will apply; which brings me to what I think is a very serious dilemma.

If in fact we can't distinguish between these rules; if in fact there is really a genuine and perhaps insoluble uncertainty as to what constitutes a substantive rule and what constitutes a procedural rule, the only practical way out may be for Congress to enact the Federal rules as though they were a statute.

I am not suggesting that one dispenses with the advisory committee or with the structure that is in place, they have been remarkably effective, and the Federal rules are a fine body of work. And

the work of Judge Gignoux and that committee is, I think, one of the important centerpieces of Federal jurisdiction.

But I believe that to the extent that they make a recommendation to Congress, the only conservative way, the only safe way, to enact that recommendation, and know that it will not be subsequently challenged as being beyond the power of the courts to promulgate would be for Congress to pass it and send it up to the President and have the President sign it.

As I understand it, and this is something that I have not conducted a systematic study on, most State legislatures enact judicial rules of procedures. They treat it as though it is a statute; and they pass it, and it goes up to the Governor, and the Governor vetoes it or not, and it is discussed as part of the legislative process.

I think it is a myth. There is a myth that Federal procedure is somehow an arcane decisionmaking process that can be left to experts because it doesn't really affect the substantive rights of people.

Most litigators, I think, will tell you that one of the determining factors of how much justice exists in any system is the nature of the procedural rules that govern it. And to exempt those procedural rules from the traditional democratic process, is a very serious policy decision which we are assuming is correct—in large part because the advisory committee has done such a wonderful job in giving us good rules over the years.

But what the *Chadha* case has done is to focus attention on whether or not the Constitution allows us to do that; on whether or not we must, as a democratic nation, take responsibility for the nature of those procedural rules and enact them as part of the congressional process.

I recognize that is a troublesome question, it brings another issue into an already overburdened area. But I am afraid if we ignore it, one of these days a litigant who has lost, for example, because a class action rule has been construed against him, is going to challenge that rule and may bring the entire structure down; and we will be faced with the same kind of crisis that we have with the bankruptcy courts. Because if those Federal rules go, what is going to govern the operation of the Federal judicial system until we get something else in place?

Thank you, sir.

Mr. KASTENMEIER. Thank you.

Is there some comparable limitation of the power of district courts who promote local rules?

Mr. NEUBORNE. Yes, I think quite clearly. I think that to the extent the district courts begin to enact local rules which have dramatic effect on people's ability to enforce their rights in court, they are engaging in lawmaking.

Mr. KASTENMEIER. Same analysis.

Mr. NEUBORNE. Yes. In fact, even worse, because it will be done on a localized basis and you won't have any uniformity.

I was pleased to hear that Judge Gignoux suggested that rule 83 is being seriously reconsidered by the advisory committee because I think it would have been a serious mistake at this point to go forward with it.

Mr. KASTENMEIER. Do others share your analysis, the American Bar Association, or any others, share the same reservations you do?

Mr. NEUBORNE. In informal conversation with my colleagues on various academic faculties, I think it is a widely shared view that, for example, rule 68 would have been beyond the power to promulgate. That once Alyeska says that there is species of rules which it so impacts on people's lives that it requires legislative sanction, that the existing Rules Enabling Act is inadequate to give that rule legislative sanction.

I think that would be a widely shared view, sir.

Mr. KASTENMEIER. Did I understand you also to suggest that given this analysis, we ought to think carefully about diminishing or eliminating the Supreme Court from the process; indeed, we should encourage full participation or what is called reasonable—not less than current participation by the Court in the process?

Mr. NEUBORNE. I think that we should eliminate the Supreme Court from the promulgation process. The Supreme Court ought not to be the body that promulgates the rules because it is reasonable to believe, I think, that they would be called upon at some subsequent point to sit in judgment of their validity, and that would create both an appearance of injustice because you would have the same body that promulgated the rule sitting in judgment. I think it might cause a good deal of embarrassment to the Justices themselves.

So I think we would be doing the Court a favor were we to remove it from the process at this point.

Mr. KASTENMEIER. Can the courts, by rule or decision, create a statute of limitation on an action?

Mr. NEUBORNE. There is the tradition, of course, of common law laches, which is a judge-made limitation. But I think the point that you are getting at, Representative, and it is a very difficult point, is that the Supreme Court has held that the statute of limitation is substantive for the purposes of the Erie doctrine and has said that, therefore, you must use State law in a diversity case.

If the Supreme Court has already said that it is substantive, I read that to mean that it can only be done by the legislature because the courts can enunciate procedural rules but not substantive rules.

Mr. KASTENMEIER. It seems to me likely that the courts may be into such questions with respect to both judicial discipline and habeas corpus.

Mr. NEUBORNE. I think that is correct. If there is an analogy, in the 1983 era, there is no Federal statute of limitations for a 1983 case. The courts, with the approval of the Supreme Court, I think generally assumed that they lacked the authority to create a Federal statute of limitations out of whole cloth and, instead, must look to the limitation in each State and apply the closest State limitation. That is just an example, I think, of the trouble that we are going to get into if we have a set of rules that are made by judges without legislative sanction. We just won't know which are valid and which aren't.

Mr. KASTENMEIER. I thank you very much for your contribution here this morning, Professor Neuborne.

Mr. NEUBORNE. Thank you, sir. It is always a pleasure.

Mr. KASTENMEIER. The cautions you have expressed, I think, are worthy of our profound attention as we consider not only this bill but, indeed, in due course other matters that come before us.

Mr. NEUBORNE. May I suggest a practical suggestion that just occurred to me, and it is just talking off the top of my head. It may be that to the extent that the advisory committee is maintained in its current general posture, subject to the restrictions in the bill, that one of the things that they should report to Congress specifically in connection with each proposed rule, is that they have considered whether or not it is in fact something that is within the inherent judicial power to promulgate or whether it requires a degree of legislative sanction.

They are a distinguished body of scholars and practitioners and it would be of some assistance, I think, to Congress in considering these issues to have their considered view on whether or not it is or is not subject to that type of problem.

Mr. KASTENMEIER. We will certainly take that recommendation or suggestion under consideration.

It has been suggested that we ought to solicit your view about the legislative veto juxtaposed against the *Marathon* decision in terms of—we probably could have also explored that with Judge Gignoux and other witnesses, but if you do have any comments.

Mr. NEUBORNE. The comment is a very general one, sir, and you have thought much more deeply about this than I have, but that they are of a piece—the *Marathon* decision and the legislative veto decision, it seems to me, are both extraordinarily conservative, in the best sense of the word, decisions.

What they do is they go back to the original understanding of the separation of powers, and they say that that the judiciary should be involved performing judicial acts; article III judiciary officials should perform article III judiciary acts; article I officials should perform article I acts.

Despite the temptation in the modern world to try to create hybrid institutions to attempt to do things more efficiently, they must comply with the more traditional recognition of separation of powers.

Now, to have said that doesn't answer the question of what that traditional conception is; but I think it is a warning by the Court that we may have strayed too far from the traditional underpinnings of the separation of powers doctrine.

Mr. KASTENMEIER. In the legislative branch, I suppose the same thing would be true of *Buckley* v. *Valeo*.

Mr. NEUBORNE. Exactly. I think *Buckley* was the beginning of the Court's warning to us. *Buckley* was the first time that they enunciated that and these other decisions are simply, I believe, continued reiterations of the same thing.

Mr. KASTENMEIER. And we have, you know, on the *Pacemaker* case and others, questions have been raised, if not resolved in an institution-shaking way, nonetheless, it is true we see these warnings about what offends the Constitution structurally and makes it very difficult because I think we have made other assumptions in some respects and they have been erroneous.

Thank you for that comment, it is a very wise comment.

Mr. NEUBORNE. Thank you, sir.

Mr. KASTENMEIER. Therefore, the committee is indebted, both to Professor Neuborne and Richard Schmidt, as well as Judge Gignoux, for their appearance today and the discussion of what may appear to be a rather arcane and minor issue but really has much more profound implications for us. I hope we have an opportunity to fully explore and benefit from the testimony we have had in reaching some legislative judgment about these matters.

Thank you.

This concludes the hearing today and hearings, indeed, on the subject of H.R. 4144.

[Whereupon, at 11:30 a.m., the subcommittee adjourned.]

ATTACHMENT A

[From the Congressional Record, Oct. 18, 1983]

RULES ENABLING ACT OF 1983

The SPEAKER PRO TEMPORE. Under a previous order of the House, the gentleman from Wisconsin (Mr. Kastenmeier) is recognized for 5 minutes.

Mr. KASTENMEIER. Mr Speaker, today I am pleased to introduce a bill that reforms the method used by the Federal judiciary for the promulgation of rules of procedure and practice. Since the adoption of the original Rules Enabling Act in 1934 there has been no systemic change in the way in which the procedural rules for Federal courts come into being. This bill modifies these procedures to assure greater openness, consistency, and quality in the Federal rules.

As chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, in the past few years I have been involved in some of the controversies associated with various proposed changes in the Federal rules. Under current law, proposed rule changes are forwarded to the Congress by the Supreme Court. As a general practice, however, the Court does not play an active role in creating the rules. As a general proposition, unless Congress acts affirmatively to block the proposed rules, the proposals go into effect. Procedural rules so promulgated have the force and effect of law. In part as a result of the shadowy nature of this process, a number of proposed rule changes have been rejected by the Congress in recent years. For example, in 1970 the Congresss rejected the proposed rules of evidence. More recently the Congress has frequently delayed the effective date of proposed changes to permit additional scrutiny or to make substantive changes in the rules.

In the past decade there has been a growing body of thought about and criticism of the rulemaking process. Academic critics and other learned commentators such as the American Bar Association and Chief Judge Weinstein, Eastern District of New York, have long urged reform of the rules process. My former colleague, Congressman and now Judge Hungate has been involved in this issue in the past. Another former colleague, Congresswoman Holtzman, Introduced a proposal for change.

Similarly, on the Senate side, Senator DeConcini has expressed interest. The Fourth Seminar on the Administration of Justice, sponsored by the Brookings Institution in Williamsburg, Va., March 6 to 8, 1981, contained an excellent session on the rulemaking process. The professors were Judge Hungate and Judge Edward T. Gignoux, who is now chairman of the Judicial Conference's Standing Committee on Practice and Procedure. This Congress my subcommittee held an oversight hearing on the rules process. The biggest surprise of that hearing was that it was the first such congressional hearing in the nearly 50 years that the rulemaking process has been in place. The hearing clearly established the need for legislation in this area.

In addition, another result of the oversight hearing was the issuance of a set of written, publicly available procedures to be used by the Federal judiciary in the rules process. Many of these procedural suggestions are incorporated in my bill. However, my bill goes beyond current law and regulations in several important respects:

First, under the bill the Supreme Court will no longer be involved in forwarding the rules to the Congress. Rather, this function will be performed by the Judicial Conference of the United States. This change is consistent with the views of the nine Justices of the Court.

Second, the time period that rules are to lay over in Congress is made consistent for all of the different types of rules. Under current law the layover period varies.

Third, the one-House veto provisions of 28 U.S.C. 2076 are deleted in light of the Supreme Court's legislative veto decision. See Chadha against Immigration and Naturalization Service.

Fourth, meetings of the various advisory committees are made open, subject to a vote of a majority of members to close them. This "sunshine" approach to open meetings is the same as that used by Congress. The meetings of the other committees of the Judicial Conference need not be open.

It is my hope that the provisions of my bill serve as a vehicle for reform in this area. While individuals and groups interested in the rulemaking process may have differing views about some of the details contained in the bill, I believe that all of us recognize that by making the rulemaking process more accountable all parties will be better served. If the bill is enacted: First, the Congress will be called upon less frequently to overturn the results of the deliberations of the rulemaking process; second, the parties and lawyers who use the Federal courts will have greater confi-

dence in the process by which important rules are developed; and finally, third, the shroud of mystery will be lifted from the whole process, to reveal the fine work undertaken within the rulemaking process for the Federal courts.

I

98TH CONGRESS
1ST SESSION

H. R. 4144

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 18, 1983

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Rules Enabling Act of 1983".

RULES ENABLING ACT AMENDMENTS

SEC. 2. (a) That title 28 of the United States Code is amended by striking out section 2072 and all that follows through section 2076 and inserting in lieu thereof the following:

"§ 2072. Rules of procedure; power to prescribe

"The Judicial Conference shall have the power to prescribe rules of practice and procedure (including pleading and all other such incidental matters) for cases (including all bankruptcy matters) in the district courts (including before magistrates thereof) and the courts of appeals of the United States.

"§ 2073. Rules of procedure; method of prescribing

"(a)(1) The Judicial Conference shall appoint committees, consisting of a balanced cross section of bench and bar, and trial and appellate judges, to assist the Conference by recommending rules to be prescribed under section 2072 of this title. The term of a member of such a committee is five years.

"(2) No person shall serve as a member of any one of the committees appointed under subsection (a) of this section for a total of more than ten years.

"(b)(1) A separate committee appointed under subsection (a) of this section shall consider each of the following areas:

"(A) Civil rules.

"(B) Criminal rules.

"(C) Evidence.

"(D) Bankruptcy.

"(E) Appellate procedure.

"(2) In addition to the committees listed in paragraph (1) of this subsection, there shall be appointed under subsection (a) of this section a standing committee on rules of practice and procedure, which shall review each recommendation of each of the committees so listed for consistency with each other and existing rules and recommend to the Judicial Conference such changes as may be necessary to maintain that consistency and otherwise promote the interest of justice.

"(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under subsection (a) of this section shall be open to the public, except when the body so meeting, in open session and with a majority present, determines that all or part of the remainder of the meeting on that day shall be closed to the public. A transcript of each such meeting in open session shall be maintained by the committee and made available to the public.

"(2) Any meeting for the transaction of business under this chapter by a committee appointed under subsection (a) of this section shall be preceded by sufficient notice to enable all interested persons to attend.

"(d) In making a recommendation under this section or prescribing a rule under section 2072 the body making that recommendation or prescribing that rule shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

"§ 2074. Rules of procedure; submission to Congress; effective date

"(a) The Judicial Conference shall transmit to the Congress not later than March 15 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect on December 15 of the year in which such rule is so transmitted unless otherwise provided by law. Upon so taking effect the rule shall supersede—

"(1) any contrary provision of law then in effect; and

"(2) any contrary rule, except a rule of the Supreme Court, prescribed under section 2071 of this title.

"(b) Any such rule creating, abolishing, or modifying a privilege shall have no force or effect unless approved by Act of Congress.".

(b) The table of sections at the beginning of chapter 131 of title 28 of the United States Code is amended by striking

out the item relating to section 2072 and all that follows through the item relating to section 2076 and inserting in lieu thereof the following:

"2072. Rules of procedure; power to prescribe.
"2073. Rules of procedure; method of prescribing.
"2074. Rules of procedure; submission to Congress; effective date."

COMPILATION AND REVIEW OF LOCAL RULES

SEC. 3. Section 2071 of title 28 of the United States Code is amended by adding at the end the following: "The Judicial Conference shall periodically compile the rules prescribed under this section by courts other than the Supreme Court of the United States and orders made under section 332(d)(1) of this title so as to provide a current record of such rules. After a preliminary review by the circuit judicial councils (in consultation with their advisory committees created under section 333 of this title) the Judicial Conference shall periodically review such rules for consistency with rules prescribed under section 2072 of this title.".

CONFORMING AND OTHER TECHNICAL AMENDMENTS

SEC. 4. (a)(1) Title 18 of the United States Code is amended by striking out chapter 237.

(2) The table of chapters for part II of title 18 of the United States Code is amended by striking out the item relating to chapter 237.

(b)(1) Section 3402 of title 18 of the United States Code is amended by striking out the second paragraph.

(2) Section 636(d) of title 28 of the United States Code is amended by striking out "section 3402 of title 18, United States Code" and inserting "section 2072 of this title" in lieu thereof.

(c) Section 9 of the Act entitled "An Act to provide an adequate basis for the administration of the Lake Mead National Recreation Area, Arizona and Nevada, and for other purposes" approved October 8, 1964 (Public Law 89-639) is amended by striking out the sentence beginning "The provisions of title 18, section 3402".

(d) Section 22(b) of the Organic Act of Guam is amended by striking out ", in civil cases" and all that follows through "bankruptcy cases".

(e) Section 25 of the Organic Act of the Virgin Islands is amended by striking out ", in civil cases" and all that follows through "bankruptcy cases".

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98TH CONGRESS
2D SESSION

H. R. 6344

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 1, 1984

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Rules Enabling Act of 1984".

RULES ENABLING ACT AMENDMENTS

SEC. 2. (a) That title 28 of the United States Code is amended by striking out section 2072 and all that follows

through section 2076 and inserting in lieu thereof the following:

"§ 2072. Rules of procedure; power to prescribe

"(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure (including rules of evidence) for cases (including all bankruptcy matters) in the United States district courts (including proceedings before magistrates thereof) and courts of appeals. The Judicial Conference may make recommendations to the Supreme Court as to the exercise of this power.

"(b) Such rules shall not abridge, enlarge, or modify any substantive right.

"§ 2073. Rules of procedure; method of prescribing

"(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

"(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under section 2072 of this title. Each such committee shall consist of a balanced cross section of bench and bar, and trial and appellate judges.

"(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice and procedure under subsection (a) of this section. Such standing committee shall review each recommendation of any other

committees so appointed and recommend to the Judicial Conference rules of practice and procedure and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

"(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. A minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

"(2) Any meeting for the transaction of business under this chapter by a committee appointed under this section shall be preceded by sufficient notice to enable all interested persons to attend.

"(d) In making a recommendation under this section or under section 2072, the body making that recommendation shall provide a proposed rule, an explanatory note on the

rule, and a written report explaining the body's action, including any minority or other separate views.

"(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 of this title.

"§ 2074. Rules of procedure; submission to Congress; effective date

"(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending. Upon so taking effect the rule shall supersede any contrary rule or provision of law relating to practice and procedure.

"(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.".

(b) The table of sections at the beginning of chapter 131 of title 28 of the United States Code is amended by striking out the item relating to section 2072 and all that follows through the item relating to section 2076 and inserting in lieu thereof the following:

"2072. Rules of procedure; power to prescribe.
"2073. Rules of procedure; method of prescribing.
"2074. Rules of procedure; submission to Congress; effective date.".

COMPILATION AND REVIEW OF LOCAL RULES

SEC. 3. Section 331 of title 28 of the United States Code is amended by adding after the fifth paragraph the following new paragraph:

"The Judicial Conference shall periodically compile the rules which are prescribed under section 2071 of this title by courts other than the Supreme Court of the United States so as to provide a current record of such rules. The Judicial Conference shall periodically review such rules for consistency with rules prescribed under section 2072 of this title. The Judicial Conference may modify or abrogate any such rule found inconsistent in the course of such a review.".

RULES BY DISTRICT AND CIRCUIT COURTS

SEC. 4. (a) Section 2071 of title 28 of the United States Code is amended by adding at the end the following paragraphs:

"Any such rule of a district court shall be made or amended only after giving appropriate public notice and an opportunity for comment. Such rule so made or amended shall take effect upon the date specified by the district court and shall remain in effect unless modified or abrogated by the District Court or modified or abrogated by the judicial council of the relevant circuit. Copies of such rules so made or amended shall be furnished to and the Administrative Office of the United States Courts and be made available to the public.".

(b) Section 332(d)(1) of title 28 of the United States Code is amended by inserting after the first sentence "Any such order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.".

CONFORMING AND OTHER TECHNICAL AMENDMENTS

SEC. 5. (a)(1) Title 18 of the United States Code is amended by striking out chapter 237.

(2) The table of chapters for part II of title 18 of the United States Code is amended by striking out the item relating to chapter 237.

(b)(1) Section 3402 of title 18 of the United States Code is amended by striking out the second paragraph.

(2) Section 636(d) of title 28 of the United States Code is amended by striking out "section 3402 of title 18, United States Code" and inserting "section 2072 of this title" in lieu thereof.

(c) Section 9 of the Act entitled "An Act to provide an adequate basis for the administration of the Lake Mead National Recreation Area, Arizona and Nevada, and for other purposes" approved October 8, 1964 (Public Law 89–639) is

amended by striking out the sentence beginning "The provisions of title 18, section 3402".

(d) Section 22(b) of the Organic Act of Guam is amended by striking out ", in civil cases" and all that follows through "bankruptcy cases".

(e) Section 25 of the Organic Act of the Virgin Islands is amended by striking out ", in civil cases" and all that follows through "bankruptcy cases".

SAVINGS PROVISION

SEC. 6. The rules prescribed in accordance with law before the taking effect of this Act and in effect on the date of such taking effect shall remain in force until changed pursuant to the law as modified by this Act.

EFFECTIVE DATE

SEC. 7. This Act shall take effect December 1, 1985.

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SECTION-BY-SECTION ANALYSIS OF H.R. 4144,

"RULES ENABLING ACT OF 1984"

The bill contains seven sections.

Section 1 provides the short title of the bill, "Rules Enabling Act of 1984."

Section 2 strikes out the existing statutes relating to the promulgation of the Federal rules of practice and procedure and substitutes in their place three new sections in title 28, United States Code.

Proposed Section 2072 contains two subsections.

Subsection (a) provides that the Supreme Court shall have the power to prescribe general rules of practice and procedure (including rules of evidence) for cases, including bankruptcy cases in the district courts (including before magistrates thereof) and cases in the courts of appeals of the United States.*

The original bill H.R. 4144 provided that the Judicial Conference of the United States, rather than the Supreme Court, had the authority to promulgate the rules. This approach was thought to respond to the workload concerns of the Court. See Letter from Hon. Jack Weinstein to Hon. Robert W. Kastenmeier, May 31, 1983. This suggestion was initially approved by the Supreme Court. See Letter

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* This subsection omits authority to set rules for the Supreme Court of Puerto Rico. Such rule making authority can be more appropriately done by that court.

Also omitted as unnecessary surplusage are references to appeals from decisions of the Tax Court of the United States and for judicial review or enforcement of orders of administrative agencies, boards or commissions, and officers. Such appeals and review are cases, thus, already covered by the language of proposed section 2072.

from Chief Justice Burger to Honorable Robert W. Kastenmeier, May 12, 1983, reprinted in Rules Enabling Act of 1984: Hearings on H.R. 4144 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary, 98th Cong., 1st and 2d Sess. (1984) [hereinafter referred to as Rules Hearings.] See also Rules of Criminal Procedure, Order, 323 U.S. 821-823, 836 (1944) (memorandum of Frankfurter, J.); Rules of Civil Procedure, Order, 374 U.S. 861, 869-70 (dissenting view of Black, J. and Douglas, J.). After introduction of the bill, concern about this shift in authority was expressed by the Conference of Chief Justices, on behalf of State Supreme Courts. This organization feared that such a move at the Federal level would set an unfortunate precedent at the state level. In addition, the Supreme Court itself eventually expressed a preference for retaining their current authority. See Letter from Chief Justice Burger to Hon. Robert W. Kastenmeier, June 25, 1984, reprinted in Rules Hearings.

Subsection (a) also authorizes the Judicial Conference to make recommendations to the Supreme Court as to the exercise of this power.

Subsection (b) provides that such rules shall not abridge, enlarge or modify any substantive right. This provision omits as unnecessary the language of 28 U.S.C. § 2072 relating to jury trials. No change in meaning is intended.

This proposed section is derived from current law. See generally 28 U.S.C. §§ 2075 and 2072; Burbank, Rules Enabling Act of 1934, 138 U. Pa. L. Rev. 1015, 1107-8 (1982). The distinction between a substantive and a procedural right is difficult to draw. See

Testimony of Burt Neuborne, Rules Hearings. There have been some recent examples of proposals which, if promulgated, would have crossed the line from procedural to substantive. See, e.g., Proposed Changes in Rule 68 Reprinted in ___ F.R.D. ___ (1983). Thus, extreme care should be exercised to avoid this problem. This is so because this limitation on judicial rule-making is, in part, rooted in constitutional concerns about the separation of powers.

Proposed section 2074(a) provides that evidentiary privileges are substantive in nature and may not be altered except by an Act of Congress.

Proposed Section 2073 contains five subsections.

Subsection (a)(1) provides that the Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section. This idea was proposed by Congresswoman Holtzman in the 95th congress. See H.R. 7961 (95th Cong., 1st Sess. § 2074(d) (1977). The Judicial Conference has already published such a procedure. The procedures are found in 97 F.R.D. 389 (1983). This subsection merely continues that responsibility.

It is expected that this procedure will continue to prohibit voting by proxy or by delegate. Once a committee member is chosen by the Conference, that responsibility should be exercised individually. This subsection merely continues that responsibility. Subsection (a)(2) provides that the Judicial Conference may authorize appointment of committees to assist the Conference in the rules process. At the present time these committees, which are called advisory committees, and include Committees on Criminal Procedure, Civil Procedure, Appellate Procedure, and Bankruptcy. The appointment

of such committees is discretionary with the Conference.* The original formulation of H.R. 4144 required the appointment of these committees. The discretionary language in the bill was approved in response to the criticism of the Judicial Conference and the Department of Justice which had argued that more flexibility was required. It is expected, however, that the current committee structure will continue. With respect to the Rules of Evidence or Magistrates Rules then, the Judicial Conference has the discretion to respond to that perceived need by deciding whether or not to appoint an advisory committee.

Subsection (a)(2) also requires that any such advisory committees consist of a balanced cross-section of bench and bar, and trial and appellate judges. See 5 U.S.C. App. (Federal Advisory Committee Act). It is intended that the Judicial Conference give full consideration to appointing persons of intelligence, expertise, experience and commitment to the rule making process. Care should be taken to assure the full and complete representation of all segments of the bar, such as the minority and women's bar, the specialized bar (such as patent, bankruptcy, and admiralty law specialists), the public interest and civil rights bar, state, local and Federal government attorneys, defense attorneys, and the average practitioner. Contra, Hazard, Book Review, 87 Yale L. Rev. 1284, 1294 (1978). It is expected that these committees will not be dominated by any single perspective or interest group. Rather, it is hoped that the

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*Once appointed these committees will review proposals, conduct public hearings and make recommendations to the Standing Committee on Rules of Practice and Procedure.

membership of these committees will result in recommendations consistent with the purpose of the rules to provide for a fair and expeditious system of justice. See 28 U.S.C. § 331.

The Conference should develop a method for achieving such a balanced cross-section of representation through the careful weighing of the relative merits of a more rapid turnover in membership against the expertise which is obtained by more lengthy service on such committees. The original bill required a cap on length of service on the committees. The cap was eliminated to assure maximum discretion. That amendment should not discourage the use of such a rule by the Conference. See Testimony of James Holderman (on behalf of the American Bar Association), in Rules Hearings.

Subsection (b) requires the Judicial Conference to authorize the appointment of a Standing Committee on Rules of Practice and Procedure. The Standing Committee shall review each recommendation of any advisory committee and recommend to the Judicial Conference such changes as may be necessary to maintain consistency and otherwise promote the interest of justice. In addition, the Standing Committee has independent authority to recommend such rules. An example of a useful area for action would be in the promulgation of Model local and circuit rules. It is assumed that the Standing Committee will: (1) insure that important issues of practice and procedure are considered by the appropriate advisory committees; (2) assure that the proposed rules are not substantial in nature in violation of either this Act or its spirit; (3) assure that proposed rule changes have received sufficient public comment; and (4) assure that persons submitting comments on proposed rules have the

courtesy of a complete reply. See Testimony of Prof. Frank Remington in Rules Hearings, supra. The function of the Standing Committee is sufficiently important to the rule-making process that it is reasonable to assume that the Standing Committee will retain a reporter to assist them in their work.

Subsection (c) provides that each meeting for the transaction of business under this section shall be open to the public with certain exceptions. The term "open to the public" is intended to provide access to such meetings to the relevant interested parties. Such access, however, should not disrupt the deliberative process. The exception to this requirement of openness is to permit a meeting to be closed (in whole or in part) by a vote of a majority of the members of the committee involved. Any decision to close a meeting must occur in open session and such vote must be a majority of those present. The subsection also requires that the reasons for closing the meeting be specified. It is intended that this provision parallel the openness requirements of the House and Senate committees and subcommittees. Thus, there is a strong presumption that when conducting the quasi-legislative activities authorized by this act that such meetings occur in the open. As Chief Justice Burger said in Richmond Newspapers v. Virginia, ___ U.S. ___, ___ (1980),

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from hearing.

Thus, it would be inappropriate for any such committee to have a blanket rule against open meetings. There are, however, clear examples when a closed meeting would be permissible. For example, if the committee were meeting to discuss personnel matters, such as

the selection or termination of a reporter for the committee, it would be proper to conduct that business in private.

Nothing in this Act requires the meetings of the Judicial Conference (or Committees or Subcommittees thereof) or the Supreme Court to be conducted in the open with respect to the rules process.

Subsection (c)(1) also provides that minutes for each meeting for the transaction of business shall be maintained by the committee and made available to the public, except the portion of the minutes relating to a closed meeting. The deletions from the minutes relating to the closed meeting shall be the minimum amount necessary to assure that the purpose of closing the meeting is not frustrated.

Subsection (c)(2) provides that meetings on the rules shall be preceded by sufficient notice to enable all interested persons to attend. It is expected that such notice shall include an indication of the specific subject matter or rules which will be discussed. It will also assist the rule-making process if the secretary to the Standing Committee provides additional explanatory materials, upon request, to interested parties in advance of the meetings. Openness coupled with notice will encourage participation by a broad segment of the legal community and avoid potential misunderstandings and will ultimately assist the Congressional review process. See Letter of Alan Morrison to Hon. Edward Gignoux, August 20, 1982, reprinted in Rules Hearing, supra.

Subsection (d) requires that any rule-making body (including the advisory committees, the Standing Committee, the Judicial Conference and the Supreme Court) set forth a proposed rule, an explanatory note on the rule, a written report explaining the

body's action on the rule, including any minority or separate views. This requirement largely tracks the procedure currently in place. Such a procedure was suggested in 1970 by Senator Sam Ervin and Senator Dennis DeConcini. The only minor change is the emphasis on so-called "gap reports", that is, the requirement that each body clearly indicate which changes, if any, it has made to the work of the predecessor group, and the rationale therefor. It will also be helpful to the Congress if such reports comment on the treatment given to any significant comments offered during the public comment period.

Subsection (e) provides that failure to comply with this section does not invalidate a rule. This provision is merely intended to avoid litigation about the propriety of a rule when the only alleged invalidity is non-compliance with one of the minor procedural requirements of this section. This section was added at the suggestion of the Public Citizen Litigation Group, the Judicial Conference, and the Department of Justice. No legislative enactment, however, can deprive a litigant from challenging the constitutionality of a particular rule or the rule-making process in general.

Proposed Section 2074 contains two subsections.

Subsection (a) provides for the submission of rules of practice and procedure to the Congress. This subsection specifies that if the Supreme Court promulgates any rules of practice and procedure, such proposed rules shall be submitted not later than May 1. Any such rules submitted shall become effective on December 1 of that year unless otherwise provided by law. This means that the proposed rules lay over for a period of six months, and unless Congress passes a public law signed by the President which is to the contrary, such proposed rules shall go into effect. This provision regularizes

the timing of submission for the various rules. Compare, 18 U.S.C. § 3771 (layover of 90 days) with 18 U.S.C. § 3772 (layover time set by the Supreme Court). This approach to rule-making is constitutional. See Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764, 2776, n. 9 (1983), (hereinafter, Chadha).

Subsection (a) also provides that upon taking effect the rule shall supercede any contrary rule or provision of law relating to practice and procedure. The limitation to laws of practice and procedure is necessary to comply with proposed section 2072 and to avoid Chadha problems. This authority must, of course, be consistent with the Constitution. It is clear that with respect to those rules which relate to matters which are totally procedural (e.g., locations for filing or serving court papers), this "trumping" authority is appropriate. Some have questioned the "trumping" authority with respect to other issues. See Testimony of Burt Neuborne, Legal Director of the American Civil Liberties Union in Rules Hearing, supra. These problems should not occur if there is strict adherence to the requirements of proposed section 2072, which prohibits the promulgation of any rule that abridges, enlarges or modifies any substantive right.* Thus, any existing law (regardless

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* To the extent that Acts of Congress have passed on the assumption that they conferred a substantive right, such laws will not be affected by this supercession provision. For example, when the Court held that it had no inherent authority to provide for attorney fee liability in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Congress conferred a substantive right by enacting the Civil Rights Attorney Fee Award Act, 18 U.S.C. § 1988. The trumping authority contained in this section relates only to procedural laws and rules. Thus, this authority does not impinge on the role of Congress to confer substantive rights such as those mentioned above.

less of how enacted) which creates a substantive right can not be adversely affected by this rule making authority. Similar authority is held by at least 15 State Supreme Courts, and conforms to the Standards Relating to Court Organization of the American Bar Association, Section 1.31 (1974).

Subsection (b) of proposed section 2074 of title 28, United States Code, provides that any such rule creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress. This provision is derived from the current Rules of Evidence. This subsection does not contain the unconstitutional one-house veto provision found in 28 U.S.C. § 2076. See Chadha, supra.

Section 3 of the bill amends section 331 of title 28, United States Code, to provide that the Judicial Conference shall periodically compile the rules of practice and procedure for district courts and the courts of appeals of the United States. Currently it is virtually impossible to ascertain the exact nature of local district court rules or circuit rules. This responsibility with respect to civil rules is unnecesarily imposed on the Supreme Court by Rule 83 and that duty has been deleted. The Judicial Conference and the Administrative Office of the United States Courts is the more appropriate repository of such a duty. See Fed. R. Crim. P. 57; Fed. R. App. P. 47.

This section also provides that the Judicial Conference shall review such rules and orders for consistence with the rules promulgated under section 2072 of this title. This new authority is designed to avoid the current situation of having local rules which

squarely conflict with the "national" rules. See, e.g., Miner v. Atlass, 363 U.S. 641, 650 (1969) (local admiralty rule struck down); McCargo v. Hedrick, 545 F.2d 393, 401-2 (4th Cir. 1976) (local rule found to conflict with Fed. R. Civ. P. 16). This test for inconsistency should not, however, be whether the deviation made by the local rule from the general rule is "outcome determinative" (as is suggested in Colgrove v. Battin, 413 U.S. 149, 163, n. 23 (1973)); rather, the test should be whether the local rule can co-exist with the general rule without negating the purpose of the general rule. See Miner v. Atlass, supra, at 648 ("interstices" may be filled). For example, a local rule which explicitly limited the number of interrogatories which could be used would be inconsistent with the current Federal Rules of Civil Procedure. (Fed. R. Civ. P. 26). The final authority for this review rests with the Judicial Conference.

Section 4 of the bill amends section 2071 of title 28, United States Code, to provide for a method for the promulgation of local district court rules. This authority must not conflict with general rule making authority vested in the Supreme Court. See Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure, 11 Hofstra L. Rev. 997, 998, n. 2 (1983); Burbank, Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1093, n. 763 (1982). This procedure requires that prior to making such an order effective, the district court shall give appropriate notice and an opportunity for comment. It is likely that many District Courts will comply with this requirement through the use of advisory committees as well as notice and comment. The district court rules once promulgated

shall provide for an effective date. Such rules shall remain in effect unless modified or abrogated either by the District Court or by the judicial council of the circuit. The circuit review authority parallels that given to the Judicial Conference. Copies of such rules shall be furnished to the relevant circuit judicial council and the Administrative Office of the United States Courts and shall be made available to the public.

The opportunity to comment requirement found in this section is designed to encourage full and fair consultation with the members of the local bar. Weinstein, Reform of Court Rule-Making Procedures, 84-87, 127-137, 151 (1977); Wheeler, Broadening Participation in the Courts Through Rule-Making and Administration, 62 Judicature 280 (1979).

These changes respond to earlier criticisms of the rule-making process. Caballero, Is there an Over-Exercise of Local Rule-Making Powers by the United States District Courts?, 24 Fed. Bar News 325 (1977).

Section 4 of the bill also creates a parallel procedure for the promulgation of circuit rules of general applicability.

Section 5 of the bill contains technical and conforming amendments. One result of this bill is to require that rules with respect to the conduct of proceedings before magistrates follow the same rules as those applicable to Rules of Evidence, Appellate Procedure, and Civil and Criminal Procedure. Thus, subsection (b)(1) of this section strikes out the second paragraph of section 3042 of title 18, United States Code. Subsection (b)(2) also makes a conforming amendment in the Magistrates Act.

Section 6 of the bill contains a savings clause which provides that rules prescribed in accordance with law before the effective date of this act and still in effect shall remain in force and effect until changed by law. Similar savings clauses have been found in earlier enactments on the rule-making process. (See 18 U.S.C. § 3771; 28 U.S.C. § 2072). No change in meaning is intended.

Section 7 of the bill provides that this Act shall take effect on September 1, 1985.

THE FEDERAL JUDICIAL CENTER
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1520 H STREET, N.W.
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A. LEO LEVIN
DIRECTOR

TELEPHONE
202/633-6311

July 14, 1982

David Beier, Esquire
Counsel to the Subcommittee on
Courts, Civil Liberties, and
the Administration of Justice
2137 Rayburn Office Building
Washington, D.C. 20515

Dear David:

Enclosed are a variety of materials reflecting Center work touching on local district court rules. I should say at the outset that we have made no study specifically on local rules, although we have published Federal Rulemaking: Problems and Possibilities, enclosed, which deals with the national rulemaking process. As you noted, Steve Flanders, formerly of the Center staff, has an interest in local rules, growing in part out of his direction of the District Court Studies Project. This interest has led him to write "In Praise of Local Rules," 62 Judicature 28 (1978) and more recently "Local Rules in Federal District Courts: Usurpation, Legislation, or Information?" 14 Loyola of L.A. Law Rev. 213 (1981). Flanders' articles, I should stress, give Flanders' views. The Center itself does not have any formal policy on this matter, although various members of the staff have varying opinions.

The following enclosures deal in one way or another with local rules. The District Court Studies Project produced three reports, all enclosed: Case Management and Court Management . . ., Judicial Controls and the Civil Litigative Process: Discovery, and another report with the same heading on Motions. Perusal will reveal that they do not focus on the rulemaking process at the local level, but they do discuss the operation of various local rules. Sherman Cohn's "Federal Discovery: A Survey of Local Rules . . .," a reprint of which is enclosed, analyzed local discovery rules in light of proposals then pending to change the national discovery rules, and includes a thorough discussion of the local rules then in place, drawn and updated from earlier Center research cited therein. Finally, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure is a survey of what is implied in

the title and includes, as indicated at p. 2, an examination of local rules as of June, 1979.

There is, as you noted, a growing interest in local rules, and that interest is reflected in several Center activities currently underway. If you would like more information on this phase of our work, please let me know, and I can put you in touch with the appropriate people. The interest generally in local rules is due not only to the importance of the subject matter itself, but also to the recent policy announced by the Judicial Conference of the United States and reported at pp. 12-14 of the March, 1982, Report of the Proceedings of the Judicial Conference of the United States. I enclose a copy of the cover page of the report and the pages referenced. We are mindful that case management policies are not necessarily best reflected in local rules, as opposed to other forms of policy expression, and are interested both in local rules as a subject in themselves and in local rules as one of several possible vehicles for the expression of court policy on case management.

For your general information, I have enclosed a copy of the Center's 1981 Catalog of Publications and its Annual Report, which gives you a more general idea of our work and may include reference to one or two items that you might wish to have. I hope this information is of some value to you, and that you will be back in touch should you wish to learn more of what specifically the Center is doing in, among other areas, local rules and case management. In that case, I can, as I said, put you in touch with the people closer to the scene than am I.

Cordially,

Russell Wheeler
Assistant Director

RW:chm

Enclosures

cc: Mike Remington

Stand. [illegible]
Jan 183 agenda

PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N.W.
WASHINGTON, D.C. 20036
(202) 785-3704

August 20, 1982

The Honorable Edward T. Gignoux
United States District Court for the District of Maine
U.S. Courthouse
Portland, Maine 04103

Dear Judge Gignoux:

I am writing you in your capacity as Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States about a recurring problem that I have found regarding the promulgation of the various rules that the Supreme Court is authorized to issue. My principal experience has been with the Civil and Appellate Rules, although I believe that the problems that I have observed exist for the others as well.

The occasion for writing at this time is the recent enactment of legislation suspending the effect of the changes in Rule 4 of the Civil Rules until October 1, 1983, and the current consideration by the Congress of legislative alternatives to Rule 4 as it was adopted by the Supreme Court. Over the past few years, I have offered comments on several proposed rule changes, including Rule 4. In a number of instances, I found it extremely difficult to track down the proposals in the rulemaking process so that I could offer my suggestions. It has also been my experience that public comments (not only mine) seem to have little effect on the decision-makers, particularly after the first round of submissions made to the Advisory Committees. While it is possible that sugesstions from the public are in fact considered, the outward appearance is to the contrary.

In my opinion, the reason why it was necessary for Congress to step in and delay the effect of Rule 4 had much less to do with the substance of the new Rule, than with the perception that the process had not fairly considered the views of all interested persons. Part of this skepticism is engendered by the substantial secrecy surrounding the process, and part is due to the absence of any indication that serious consideration was given to comments submitted, even though they may be rejected.

Although I am concerned about the current rulemaking process, I would be even more troubled if Congress were to go into the rulemaking business on a piecemeal, let alone wholesale basis. The Judiciary Committees in Congress have neither the experienced staff nor the time needed to consider these matters fully, and yet unless the process for adopting Rules is improved, I fear that we may see more rather than less Congressional involvement. The best way to ward that off is for the Judicial Conference to make significant changes itself.

Specifically, I propose that the following steps be taken to correct the situation:

1. Insure better publicity of all proposals and reasonable opportunities for comment, both at the Advisory Committee stage and before your Committee. It is often extremely difficult to find out when a proposal leaves an Advisory Committee, or in what form, so that intelligent comments can be made in a timely fashion to your Committee.

2. Efforts should be made by the Committees to respond to the principal suggestions offered, much the way responses are made to comments submitted in an agency rulemaking proceeding. These responses would not be part of the Advisory Committee notes since their principal function would be to inform the submitter of the reasons that his suggestions were not accepted. In that way, subsequent comments would either be avoided or based on a better understanding of the Committee's thinking.

3. The public, or at least those who submitted comments or otherwise requested to be informed, should be advised when your Committee sends its recommendations to the Supreme Court so that furher submissions can be made to it. The Court also needs to have a formal mechanism for considering the Rules, as well as possibly assigning an experienced attorney (not a law clerk) to assist the Court in its deliberations.

4. Meetings of the Advisory Committees and your Committee should be open to the public. There is no doubt that these Rules have a substantial impact on litigation and that they embody significant elements of public policy beyond their seemingly technical requirements. They are, therefore, matters in which the bar, if not the public as a whole, has a significant interest, and there is no basis for the Committees that consider them to operate behind closed doors, except in the most unusual of circumstances.

I recognize that, because I have no direct experiene with the rulemaking process, these suggestions may be based on assumptions that are not entirely correct, or they may be unworkable in this form for reasons not apparent to an outsider. Nonetheless, I believe that they embody the fundamentals of a much needed reform, and I urge you to give them your most serious consideration.

I stand ready to assist you in any way that I can in this regard. I would welcome the opportunity to discuss these matters with you, either by telephone or when you are next in Washington, or to provide you with further specifics if that would be helpful.

Respectfully yours,

Alan B. Morrison

Alan B. Morrison
Director

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U.S. House of Representatives
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Telephone: 202-225-3951

May 3, 1983

The Honorable Warren E. Burger
Chief Justice of the United States
United States Supreme Court
Washington, D.C. 20543

My Dear Mr. Chief Justice:

As you know this Congress I have undertaken a number of initiatives to address the problems you have articulated with respect to the burgeoning workload of the Supreme Court. I have introduced H.R. 1968 relating to the mandatory appellate jurisdiction of the Supreme Court, and H.R. 1970 to create an Intercircuit Tribunal. We have begun the hearing process on both of these bills.

In addition to the foregoing legislative initiatives, I have begun to pursue with you the advisability of modifying any unnecessary statutory duties of the Chief Justice. In this vein it seems possible to suggest another statutory modification that could serve to ease the burden on the Court. Under the various Rules Enabling Acts the Court has responsibility for the promulgation of Rules of Evidence as well as Civil, Criminal, appellate and Bankruptcy Rules of Procedure.

During recent hearings on the rule making process several witnesses, including the American Bar Association, suggested that the Judicial Conference should be granted the duty of submitting the rules to Congress. In order to facilitate comment on this concept, I have drafted a bill to accomplish that result. It would be most helpful if you and your brethren could review this bill and provide any comments you may deem appropriate.

I have also taken the liberty of sharing this draft with Judge Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure, so as to obtain the informal views of the Standing Committee on matters unrelated to the role of the Court.

Thank you in advance for your graciously consenting to review this matter.

Sincerely,

Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

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ROMANO L. MAZZOLI, KY.
WILLIAM J. HUGHES, N.J.
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U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515
Telephone: 202-225-3951

May 3, 1983

Honorable Edward Gignoux
Judge
United States Court of Appeals
156 Federal Street
P.O. Box 8
Portland, Maine 04112

Dear Judge Gignoux:

It was a pleasure to have you appear before my Subcommittee as a witness. As you proved in your previous testimony on legislation to eliminate the diversity jurisdiction of the Federal courts, your knowledge of issues relating to the structure and jurisdiction of Federal courts is unmatched.

As a result of the hearing on the Rules Enabling Acts I have prepared a draft bill to modify the current process. I use the term "draft" bill with great care. The major purpose of the bill is to solicit formal comments prior to introduction. As you will note the bill takes the position that the rules should come to the Congress from the Judicial Conference rather than from the Supreme Court. This approach is taken so that we can obtain the views of the various Justices of the Court as well as others on this proposal.

The other items contained in the bill relating to procedures for the promulgation are similarly offered for discussion purposes. It would be most helpful to me if we could receive your informal suggestions and those of the Standing Committee after its June meeting.

Thank you again for appearing before us. I look forward to working with you in the future.

Sincerely,

Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

MDB231

inside mail
David Beier
Jud. Comm.
2137 RHOB Staffer "B"

[DISCUSSION DRAFT]
[24 March 1983]

98TH CONGRESS
1ST SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the ''enabling Acts'' to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the ''Rules Enabling Act of 1983''.

RULES ENABLING ACT AMENDMENTS

SEC. 2. (a) That title 28 of the United States Code is amended by striking out section 2072 and all that follows through section 2076 and inserting in lieu thereof the following:

''§2072. Rules of procedure; power to prescribe

''The Judicial Conference shall have the power to prescribe rules of practice and procedure (including pleading and all other such incidental matters) for cases (including all bankruptcy matters) in the district courts (including before magistrates thereof) and the courts of appeals of the United States.

''§2073. Rules of procedure; method of prescribing

''(a)(1) The Judicial Conference shall appoint committees, consisting of a balanced cross section of bench and bar, and trial and appellate judges, to assist the Conference by recommending rules to be prescribed under section 2072 of this title. The term of a member of such a committee is five years.

''(2) No person shall serve as a member of any one of the committees appointed under subsection (a) of this section for a total of more than ten years.

''(b)(1) A separate committee appointed under subsection

(a) of this section shall consider each of the following areas:

''(A) Civil rules.

''(B) Criminal rules.

''(C) Evidence.

''(D) Bankruptcy.

''(E) Appellate procedure.

''(2) In addition to the committees listed in paragraph (1) of this subsection, there shall be appointed under subsection (a) of this section a standing committee on rules of practice and procedure, which shall review each recommendation of each of the committees so listed for consistency with each other and existing rules and recommend to the Judicial Conference such changes as may be necessary to maintain that consistency and otherwise promote the interest of justice.

''(c)(1) Each meeting for the transaction of business under this chapter by any committee appointed under subsection (a) of this section shall be open to the public, except when the body so meeting, in open session and with a majority present, determines that all or part of the remainder of the meeting on that day shall be closed to the public. A transcript of each such meeting in open session shall be maintained by the committee and made available to the public.

''(2) Any meeting for the transaction of business under this chapter by a committee appointed under subsection (a) of this section shall be preceded by sufficient notice to enable all interested persons to attend.

''(d) In making a recommendation under this section or prescribing a rule under section 2072 the body making that recommendation or prescribing that rule shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

''§2074. Rules of procedure; submission to Congress; effective date

''(a) The Judicial Conference shall transmit to the Congress not later than March 15 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect on December 15 of the year in which such rule is so transmitted unless otherwise provided by law. Upon so taking effect the rule shall supersede--

''(1) any contrary provision of law then in effect; and

''(2) any contrary rule, except a rule of the Supreme Court, prescribed under section 2071 of this title.

''(b) Any such rule creating, abolishing, or modifying a

privilege shall have no force or effect unless approved by Act of Congress.''.

(b) The table of sections at the beginning of chapter 131 of title 28 of the United States Code is amended by striking out the item relating to section 2072 and all that follows through the item relating to section 2076 and inserting in lieu thereof the following:

''2072. Rules of procedure; power to prescribe.
''2073. Rules of procedure; method of prescribing.
''2074. Rules of procedure; submission to Congress; effective date.''

COMPILATION AND REVIEW OF LOCAL RULES

SEC. 3. Section 2071 of title 28 of the United States Code is amended by adding at the end the following: ''The Judicial Conference shall periodically compile the rules prescribed under this section by courts other than the Supreme Court of the United States and orders made under section 332(d)(1) of this title so as to provide a current record of such rules. After a preliminary review by the circuit judicial councils (in consultation with their advisory committees created under section 333 of this title) the Judicial Conference shall periodically review such rules for consistency with rules prescribed under section 2072 of this title.''.

CONFORMING AND OTHER TECHNICAL AMENDMENTS

SEC. 4. (a)(1) Title 18 of the United States Code is amended by striking out chapter 237.

(2) The table of chapters for part II of title 18 of the United States Code is amended by striking out the item relating to chapter 237.

(b)(1) Section 3402 of title 18 of the United States Code is amended by striking out the second paragraph.

(2) Section 636(d) of title 28 of the United States Code is amended by striking out ''section 3402 of title 18, United States Code'' and inserting ''section 2072 of this title'' in lieu thereof.

(c) Section 9 of the Act entitled ''An Act to provide an adequate basis for the administration of the Lake Mead National Recreation Area, Arizona and Nevada, and for other purposes'' approved October 8, 1964 (Public Law 89-639) is amended by striking out the sentence beginning ''The provisions of title 18, section 3402''.

(d) Section 22(b) of the Organic Act of Guam is amended by striking out '', in civil cases'' and all that follows through ''bankruptcy cases''.

(e) Section 25 of the Organic Act of the Virgin Islands is amended by striking out '', in civil cases'' and all that follows through ''bankruptcy cases''.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

EDWARD T. GIGNOUX
CHAIRMAN

JOSEPH F SPANIOL, JR
SECRETARY

May 10, 1983

CHAIRMEN OF ADVISORY COMMITTEES
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CIVIL RULES
WALTER E HOFFMAN
CRIMINAL RULES
RUGGERO J ALDISERT
BANKRUPTCY RULES
PIERCE LIVELY
APPELLATE RULES

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Dear Congressman Kastenmeier:

I am writing in response to your letter of May 3 enclosing a copy of the draft bill prepared by you to modify the current federal rulemaking process. As Chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure, I am forwarding copies of your letter and the draft bill to the members of the Standing Committee for their consideration prior to the June 17 Committee meeting. A review of the current rule-making process will be the principal item on the agenda for that meeting, and we appreciate the opportunity to consider the proposals incorporated in your draft bill. I shall be most pleased to advise you of the views of the Standing Committee after its June meeting.

May I also take this opportunity to thank you for your kind words concerning my recent appearance before your Subcommittee. Your courtesy and enlightened interest as the Subcommittee's chairman make it a pleasure to appear before you.

With best wishes.

Sincerely,

Edward T. Gignoux

SUPREME COURT OF THE UNITED STATES,
Washington, DC, May 12, 1983.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, DC.

DEAR MR. KASTENMEIER: At today's Conference of the Court, we have reviewed your letter addressed to me under date of May 3 requesting our comment on the role of the Supreme Court in rule making.

The Members of the Court see no reason to oppose legislation to eliminate this Court from the rule making process.

Cordially,

WARREN E. BURGER.

SUPREME COURT OF THE UNITED STATES,
Washington, DC, June 25, 1984.

Re H.R. 4144.

Hon. ROBERT W. KASTENMEIER,
U.S. House of Representatives, Washington, DC.

DEAR MR. KASTENMEIER: When I communicated with you earlier on this legislation, I was communicating the views of what then appeared to be the majority of the Court.

On further reflection, the Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now, but to allow the Court to defer to the decision of the Judicial Conference.

As a practical matter, what this means is that some proposed rules may be of such significance that the court may want to have its views heard, whereas probably a majority of the rule submissions are fairly routine procedural changes on which we would be prepared to rely on the views of the Judicial Conference.

Cordially,

WARREN E. BURGER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

JACK B. WEINSTEIN
CHIEF JUDGE

JUN [illegible]

May 31, 1983

My dear Chairman Kastenmeier:

In further response to your letter of May 19th enclosing the discussion draft of your proposed revision of the rulemaking process, I have now had a chance to look at the bill. It would, I think, be a great improvement over the present situation, particularly for two reasons: 1) it would unburden the Supreme Court, avoid the problem of that court passing on the constitutionality of its own work and place the power in a more representative and knowledgeable group, and, 2) its requirement for open discussions and more realistic time sequences should reduce the necessity of congressional intervention through legislation.

The local rule provision may seem weak on first reading, but it is hard to see how it can be strengthened without unduly burdening the Conference and unwisely reducing local autonomy. Perhaps it would be enough to have the legislative history show that the Conference could delegate its power to any or all of the committees mentioned in Section 2073(b).

It might be helpful to give the Conference power, under such procedures as it shall devise, to develop model local rules and to order particular local rules eliminated. If controversy develops over this approach, your more innocuous version should be, I think, adhered to.

Very respectfully,

Jack Weinstein
Chief Judge

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the Administration of Justice
U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

Northern Illinois University
DeKalb, Illinois 60115

College of Law

June 2, 1983

Representative Robert W. Kastenmeier
Chairman
House Judiciary Committee's Subcommittee
on Courts, Civil Liberties, and the
Administration of Justice
2232 Rayburn House Office Building
Washington, D.C 20515

Dear Representative Kastenmeier:

I am writing to you about your subcommittee's consideration of proposed changes in the federal judicial rulemaking process that would make the process more accessible, as well as eliminate U.S. Supreme Court involvement in Rule promulgation (May 23rd issue of Legal Times). I have not seen the proposed changes, and would appreciate your forwarding to me complimentary copies of relevant pending legislation. At this time, however, I would strongly urge the subcommittee to move ahead affirmatively with proposals regarding a more accessible federal judicial rulemaking process. Until recently, I supported such proposals primarily on non-constitutional,public policy considerations. Yet, recent U.S. Supreme Court decisions have conviced me there also exist First Amendment considerations supporting such proposals. I have enclosed for your, and the subcommittee's, benefit a few recent works which elaborate on the aforesaid beliefs.

I appreciate any attention given these materials. I would be happy to discuss further my beliefs regarding the need for more open judicial rulemaking mechanisms. I look forward to learning of the results of your subcommittee's work, and would be grateful if you could assist me in gaining pertinent information on the subcommittee's activity as it occurs.

Sincerely,

Jeffrey A. Parness

Jeffrey A. Parness
Associate Professor of Law

JAP:cb
Enclosure

cc: Bruce Lehman
Chief Counsel
House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice

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Northern Illinois University
DeKalb, Illinois 60115

College of Law

September 20, 1983

Representative Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and the Administration of Justice
House Committee on the Judiciary
2232 Rayburn House Office Building
Washington, DC 20515

Dear Representative Kastenmeier:

I recently read with great interest that you just introduced five different bills addressing the matter of diversity of citizenship jurisdiction in federal district courts, including the so-called Diversity Jurisdiction Reform Act of 1983 and the Diversity Jurisdiction and Multiparty Injury Jurisdiction Act of 1983. I would greatly appreciate your forwarding to me complimentary copies of these bills.

As well, I would like to renew a request I made last June for information on the Subcommittee's consideration of changes in the federal judicial rulemaking process (copy enclosed). I have yet to hear from you or others regarding this request. Because my earlier packet may have failed to reach its destination, I have enclosed another copy of an article which I believe pertinent to the topic of the federal judicial rulemaking process.

I look forward to hearing from you soon, and thank you in advance for your prompt and courteous attention.

Sincerely,

Jeffrey A. Parness

Jeffrey A. Parness
Associate Professor
of Law

JAP/rm
Enclosures

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September 1, 1983

James F. Holderman, Esq.
Sonnenschein, Carlin, Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606

Dear Jim:

You have written to me often enough to be aware of the vagaries of my correspondence habits. Even so, it may seem a bit extreme that I am just now getting around to answering your letter of May 25th (if you remember that far back). Let me say, first of all, that the length of time it takes me to respond to a particular letter is directly correlated to the importance of the letter in question. Whenever I get a letter which can be kissed off with a thanks and goodby type of response, I usually do that right away. But when I get a letter (or, letter with enclosure) which requires some reading and reflection, then it takes longer. First, I put it aside to be read as soon as I have a spare moment, and then -- well, you know the rest. The letter gets buried both in the physical and mental sense, only to be discovered in my semiannual treck to the trash compacter with what has collected in my office.

I certainly have an interest in the subject you addressed before the House committee, for it is a process in which I have been involved for the past nine years as reporter for the Criminal Rules Committee, and I am now about to get into it in a somewhat different way. The Chief Justice has just appointed me to a six-year term on the Gignoux Standing Committee.

First of all, let me say that I agree with your position that it would be better if the Supreme Court were not even nominally a part of the process. Experience has shown that (with very rare exceptions, and none recently) the Court merely forwards on what they have received, and I doubt whether they are in a position to do anything else. As you quite correctly note, since they may later be called upon to pass upon a challenge to one of the rules, it would at least look better if they had not been part of the enactment process.

I also agree that the procedures of the rule making process should be published. This is, as you may know, about to happen, as the forthcoming proposed amendments will carry with them a statement of these procedures

by the Standing Committee. I was pleased to see that you did not suggest that Advisory Committee meetings at which only preliminary discussions occur be open to the public. The past practice has been that they are not really closed, but that only a few others are actually invited to attend (typically representatives of the appropriate Congressional committees), and I think you are absolutely right in suggesting that complete openness at that point would be counterproductive. I must say I have serious doubts as to whether even other meetings of the Advisory Committee ought to be open in the sense of being held in an auditorium and with invitations dispersed far and wide. Certainly those who came could be spectators only and not participants, and I really do not think that such a change in the atmosphere would at all enhance the deliberative process. More promising, I would think, which you also suggest, is more complete and more readily available minutes of these meetings.

As for public hearings on rules proposals, which we experimented with last time (when you appeared before the Chicago panel), it has now been built into the process. Based on our experience with the hearings the last time around, I would have to say in all honesty that I cannot think of a single point or observation which was produced via the hearing process that was not communicated, often more effectively, via the traditional letter-to-the-committee process. Having said that, I would nonetheless acknowledge that there is value in the hearing procedure, primarily in terms of giving the entire process more legitimacy. The one fact which emerged with unmistakable clarity during the hearings is that each of the witnesses felt they had received a fair opportunity to put their views to the Advisory Committee. Though the Committee in fact gives very careful attention to written communications, that is a more impersonal process and thus I am not at all surprised that those who write might have some doubts as to whether their views have been considered. (The new procedures will ensure that those who write are more precisely informed as to the consideration their comments received.)

Finally, let me say that I concur in your views concerning the role of the Congress in the process. I would add that I believe congressional involvement in the rule-making process is quite appropriate and serves as a proper check on the work of the Judicial Conference and its committees. But there was a time during my tenure when the involvement by the Congress was not always of the highest order. Given the elaborate process and all the steps the rules go through before they get to the Congress, I would think they are at least entitled to a presumption of correctness at the outset, but it sometimes seemed to me that the presumption was running the

other way. Though I do not now recall the subject matter under discussion, I remember one of the congressional committee hearings at which I testified, when one of the committee members then produced a letter from a constituent questioning one of the proposed amendments. I carefully explained that this constituent had misread both the amendment and the legal authorities upon which he was relying. The response, in effect, was that this made no difference and it was urged that the amendment be changed as the constituent wished since it would not "totally destroy" the amendment's purpose. (I somehow kept my composure through all of this.)

In any event, let me say that I appreciate your sending me your thoughtful and provocative statement on the rule-making process. I profited from it, as I am sure the House committee did. We are indeed fortunate that bright and able lawyers such as yourself have taken and interest in the subject and have generously devoted time and effort to it.

If, as I suspect will be the case, you get down this way this fall, I hope we can get together for lunch.

Best personal regards,

Wayne

Wayne R. LaFave
Baum Professor of Law

WRL:ch

American Bar Association

GOVERNMENTAL AFFAIRS GROUP
DIRECTOR
Robert D. Evans
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EDITOR WASHINGTON LETTER
Rhonda J. McMillion

December 19, 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties, and
the Administration of Justice
Room 2137
Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The American Bar Association is pleased that you have introduced legislation (H.R.4144) to revise the federal judicial rule-making process.

James Holderman represented the ABA at the April 21, 1983 hearing held by your Subcommittee to examine this process and explore possible improvements to it. H.R.4144 embodies many of the principles the ABA espoused at the hearing on the basis of its policy that was approved by the Association in February, 1982. A number of these are of particular significance and will measurably improve the process.

For example, the bill transfers the rule-making responsibility from the Supreme Court to the Judicial Conference of the United States. In practice, the Court has chosen to play only a nominal role in the process, and the proposed change will place officially the responsibility with the body that currently exercises it. In addition, it removes the Court from the awkward position of having to decide cases involving disputes over rules that it has previously approved.

The bill also provides procedures for opening meetings at which rule amendments are considered and provides for a record to be kept of these proceedings. Although some of these procedures are currently practiced in the course of the judicial rule-making process, we agree it is good policy to formalize them through statutory provisions.

Finally, H.R.4144 extends the time period for congressional review of proposed rules. The need for the extension was amply demonstrated in the hearings you held this past spring. Currently, rule amendments are submitted to Congress around May 1. The ensuing 90-day period presently provided for review contains two major holiday recesses for Congress. In presidential election years, this period also encompasses periods when Congress is in recess for major political conventions. A longer period of review than is currently provided is clearly warranted.

Many persons are unaware that judicial rule-making

Attachment C

authority is unquestionably the prerogative of Congress. The introduction of H.R.4144 makes it clear that Congress is continuing to exercise its constitutional responsibilities in this area.

The American Bar Association commends your initiative in dealing with this issue and supports your efforts to reform and improve the federal judicial rule-making process. We will be pleased to assist you or your staff in any way to facilitate the enactment of H.R. 4144.

Sincerely,

Robert D. Evans

Robert D. Evans

RDE/cr

cc: Members of the Subcommittee on Courts, and
the Administration of Justice

UNIVERSITY of PENNSYLVANIA
PHILADELPHIA 19104

The Law School
3400 Chestnut Street I4

January 13, 1984

Honorable Robert Kastenmeier
United States House of Representatives
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
2137B Rayburn
Washington, DC 20515

Dear Representative Kastenmeier:

I am happy to submit comments on H.R. 4144, The Rules Enabling Act of 1983. The subject of court rulemaking has been the central concern of my research for four years. See Burbank, "The Rules Enabling Act of 1934," 130 U. Pa. L. Rev. 1015 (1982) (hereinafter cited as "Rules Enabling Act"); Burbank, "The Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power," 11 Hofstra L. Rev. 997 (1983) (hereinafter cited as "Some Questions About Power"); cf. Burbank, "Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," 131 U. Pa. L. Rev. 283 (1982); Burbank, "The Federal Judicial Discipline Act: Is Decentralized Self-Regulation Working?," 67 Judicature 183 (1983). I am delighted that you propose to take a comprehensive view of the subject, and I hope that these comments are helpful in that enterprise.

1. The Proposal to Replace the Supreme Court with the Judicial Conference

At the start, the draft bill presents the questions whether the Supreme Court should be relieved of its supervisory court rulemaking responsibilities, and if so, what is the best replacement. I

understand that the Court is not opposed to being relieved of those responsibilities. Certainly, the common perceptions that the Court acts primarily as a rubber stamp, that its role as rule promulgator has prevented it from being "zealous" in "correcting its mistakes, if any has been made," see "Rules Enabling Act," supra, at 1178-79, and that friction with Congress over proposed rules and amendments has harmed or holds the potential for harming the institution, furnish strong arguments for that course. But changes in the infrastructure and process of supervisory court rulemaking should diminish the costs of Supreme Court involvement; attention by the rulemakers to what might be called the substantive jurisprudence of rulemaking would, I believe, reduce them further. See "Rules Enabling Act," supra, at 1193. Moreover, it remains to consider the benefits of present arrangements. Would rules promulgated by the Judicial Conference or some other body command the same respect within the federal system, so as to be applied in letter and spirit by federal judges? Would they attract emulation by the states, so as to foster national uniformity? I do not offer answers to these questions, but I believe they deserve futher exploration at congressional hearings.

If it appears that the Supreme Court should be relieved of its supervisory court rulemaking responsibilities, the prospect of the Judicial Conference as its replacement, although obvious, should not for that reason pretermit consideration of the legal and prudential questions raised by the proposal or serious attention to alternatives.

As for the legal question, I know that the American Bar Association's Section on Criminal Justice has expressed the view that

there could be no serious constitutional objection to a congressional delegation to the Conference. With diffidence, because I am not a constitutional law scholar, I am not so sure. The constitutional framework of federal court rulemaking is murky at best. See "Rules Enabling Act," supra, at 1114-21. For that reason alone, the question should be addressed at congressional hearings by those more conversant than I with the Court's cases on separation of powers.

As for prudential questions, it is important to recognize that, in replacing the Court with the Conference, the draft bill is substituting one rubber stamp for another. The potential costs of friction and of prejudgment, addressed above in connection with the Court, are reduced or avoided, but could they not similarly be avoided, with the possibility of greater benefits, if the task were delegated to some other body? In that regard, it is interesting to note that the commission idea advanced by Professor Lesnick in 1975 (and rejected by the ABA) echoes a proposal made by Chief Justice Taft in 1922. See "Rules Enabling Act," supra, at 1070, 1196 n.780. But Taft's proposal envisioned Supreme Court approval. I can imagine numerous objections to the commission plan, both legal (see above regarding the Conference) and prudential. My point is only that, if Congress intends comprehensively to amend the Enabling Acts, it should take the time necessary to ensure the best possible arrangements for the future.

2. Proposed § 2072

Whether or not the decision is made to replace the Supreme

Court with the Conference, it makes sense to bring together in one place all, or as many as possible, of the existing grants of supervisory rulemaking powers. This, I take it, is what proposed § 2072 attempts to do. Although I have not had as much time as I would like to study the draft and I am not versed in the art of legislative draftsmanship, a number of caveats occur to me:

a. The bill should include a reference to "general rules" to ensure that federal supervisory court rules are national in scope. See "Rules Enabling Act," supra, at 1193 n.763. There is considerable controversy over local rules promulgated by the district courts. Rule 83 of the Federal Rules of Civil Procedure purports to authorize the promulgation of such rules and to require only that they be consistent with the Civil Rules. 28 U.S.C. § 2071, on the other hand, requires that such rules be consistent both with Federal Rules and with federal statutes. If Rule 83 is valid, by the terms of 28 U.S.C. § 2072 it supersedes (pre-existing) inconsistent federal statutes, including perhaps § 2071. I have taken the position that Rule 83 is not valid, see "Rules Enabling Act," supra, at 1193 n.763; "Some Questions About Power," supra, at 998 n.2, and my argument is precisely that it is not a "general rule" authorized by § 2072.

Lest there be any doubt that my concern has practical implications, I would remind you that the Advisory Committee has proposed an amendment to Rule 83, the effect of which would be to insulate certain local rules from challenge for inconsistency with the Federal Rules for a period of two years. See 98 F.R.D. 337, 370-71 (1983). Of course, this proposed amendment is flatly inconsistent with 28 U.S.C. § 2071.

b. The bill should include the prohibition that the rules authorized may not "abridge, enlarge or modify any substantive right." Although the history of the 1934 Act makes it clear that, originally, that language had no independent significance (it reinforced limitations thought to inhere in the words "practice and procedure"), see Burbank, "Rules Enabling Act," supra, at 1107-08, eminent scholars have argued to the contrary. The omission of the language, even though it has been gutted by Supreme Court decisions, see, e.g., Sibbach v. Wilson, 312 U.S. 1 (1941), and is not found in all of the Enabling Acts,[1] might convey a

1. At least in connection with the Criminal Rules Enabling Act, it appears that the omission is of no significance, because those responsible for the bill proceeded on the assumption that "rules of pleading, practice, and procedure," imported the identical limitation. See Burbank, "Rules Enabling Act," supra, at 1170 n.664.

misleading message to the rulemakers and the courts. Moreover, there is a significant risk of mixed messages as a result of the bill's parenthetical, "including pleading and all other such incidental matters." I would note that the proposed parenthetical has little if any determinative content in an umbrella bill that includes, for instance, authority to promulgate rules of evidence. In any event, whether one attributes the expansion of the federal judiciary's power under the 1934 Act to the practical realities of government or to the natural tendency of individuals to seek greater power, many of the matters regulated by the Federal Rules of Civil Procedure today cannot reasonably be described as "incidental." In my view, the parenthetical holds no hope of restoring a sensible allocation of power between the rulemakers and Congress and should be deleted.

Retention of the basic limiting language in the text of the legislation, on the other hand, would provide a firmer ground upon which to seek economy of language in omitting the other restrictions on supervisory court rulemaking in various Enabling Acts (see, e.g., 18

U.S.C. § 3772), only one of which (see 28 U.S.C. § 2076) is included in the draft bill. At least it would do so in conjunction with legislative history making clear Congress' intent to preserve such restrictions. As it is presently drafted, the bill will require entirely too much clarification in legislative history.

Given the Court's consistent aggrandizement of its powers under the Enabling Acts, it would be foolish for Congress to omit in an umbrella act what is generally perceived as the major limitation on the rulemakers' powers under § 2072. Indeed, I believe the rulemakers should be asked to formulate "standards or guidelines delineating the proper spheres of [their] activity" under the Enabling Acts. "Rules Enabling Act," supra, at 1195. Such a statement could be very useful to Congress in this enterprise. If the judiciary's statement reflected an allocation of power satisfactory to Congress (and did not just rely on essentially meaningless or almost infinitely elastic language in the Supreme Court's opinions), it could be incorporated in the legislative history. If, on the other hand, the statement suggested a continuing purpose to seek "procedural" reform

wherever it may be found, even at the expense of substantive rights, relying on Congress to step in when it can be moved to do so, then Congress should consider itself attempting to formulate more precise guidance. I do not underestimate the difficulty of that task, but I remain convinced that procedural safeguards of the sort this bill would implement are insufficient to prevent future controversy in Congress. See "Rules Enabling Act," supra, at 1193-97.

Finally in this aspect, it may be necessary to give more thought to the treatment of the Federal Rules of Evidence in light of the history preceding their passage as a statute and the older history suggesting an (unnecessarily) restrictive view of rulemaking power under the 1934 Act. See "Rules of Enabling Act," supra, at 1137-44.

c. I am not sure that it is wise to rely -- as I assume you intend to rely -- on legislative history for the effect of valid rules promulgated under the proposed act on previously enacted statutes. As a result of the Supreme Court's legislative veto decision, there may be some question about the constitutionality of court rules trumping statutes (although there

is no question that the process for congressional disapproval of rules is constitutional). Moreover, the provision for supersession was first put in the bill that became the 1934 Act precisely because of constitutional doubts, and it was thought to cure any problem in that regard. See Burbank, "Rules Enabling Act," supra, at 1052-54. It may be wise to seek the testimony or opinions of constitutional scholars on these issues.

d. Unless Congress is satisfied that it understands the historical reasons for the language of the rulemaking grants in the Enabling Acts, there is some risk in the degree of compression of the draft bill. As an example, what about the district courts for the District of the Canal Zone and the Virgin Islands and the Supreme Court of Puerto Rico, all of which are included in the grants made in 18 U.S.C. §§ 3771 and 3772 (but not in the other Enabling Acts)? There may be an easy answer to this and similar questions; I have not had the time to comb the statutes. But it may be worthwhile to sacrifice some economy to ensure against inadvertent omission. I suggest starting with a draft that includes all of the grants and deleting language only when it is clear that

nothing is lost by doing so. Enclosed is my hasty effort. I am sure it can be improved.

3. Proposed § 2073

a. Should this provision be, instead, an amendment to 28 U.S.C. § 331? In any event, the fifth paragraph of that section will require amendment.

b. I would not confine the Standing Committee as suggested in (b)(2) (note, however, that the "promote the interest of justice" language is broader than the constistency criterion). One can expect little substantive review by the Conference itself, and the injunction to appoint broadly representative advisory committees is unlikely to achieve much. A major goal of the bill is to get Congress out of the business of routinely reviewing supervisory court rules on the merits. Why eliminate a possible check on advisory committee over-reaching (or poor judgment)? If anything, the Standing Committee should play a greater role than it does at present.

c. In my view, procedures ensuring (1) an adequate period of notice of, and for comment on, proposed rules and amendments; (2) public hearings; and (3) response by the rulemakers to

consequential comments received are significantly more important than open meetings of the advisory committees (it is unclear whether the requirement in proposed § 2073(c)(1) applies to the proposed standing committee). I am aware that the Standing Committee has recently caused to be published a statement of "Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure," 97 F.R.D. 389 (1983), that includes procedures for notice and comment, public hearings and a meaningful record (see also proposed § 2073(d)). I see no reasonable objection to incorporating in the bill the essential features of those procedures. Moreover, if that is done, it seems to me that the procedures, particularly taken together with the requirement of more representative advisory committees, meet any legitimate public accountability concerns. That is not to say that I agree with the proposal regarding advisory committee composition. See Hazard, Book Review, 87 Yale L.J. 1284 (1978).

There are risks in assimilating the rulemaking process to the legislative process. One of them is that decisionmaking in the sunshine will be at best a formality and at worst an exercise in hypocrisy. Another is that, through

the linkage of open meetings and publicly available transcripts, litigants will be provided with a fertile source of mischief. As a scholar I found the original Civil Rules Advisory Committee's papers very useful. See "Rules Enabling Act," supra, at 1132-33 n.529. But use by attorneys is a different matter. Indeed, Chief Justice Hughes ordered the offical papers of the original committee sealed precisely to prevent use by litigants. I would delete proposed (c)(1) and (2).

4. Proposed § 2074

a. In connection with (a), Congress should advert to the rhythm of Judicial Conference business in setting a deadline for transmittals. In addition, although a uniform period is desirable, six months would seem adequate. Thus, I would suggest a deadline of May 1 for transmittal and an earliest effective date of November 1 (with power in the Conference to specify a later date).

b. The preservation in (b) of the restriction in § 2076 is bound to raise questions about other restrictions in the various Enabling Acts that are not mentioned. Again, however, it is

not clear that including the "abridge, enlarge, or modify" language will be adequate because of the history of the Federal Rules of Evidence.

5. Proposed Section 3

a. § 2071 requires another amendment, referring as it does to "rules of practice and procedure prescribed by the Supreme Court" (by which is intended rules prescribed pursuant to, e.g., § 2072).

It may be sensible to include a subset of "orders made under section 332(d)(1) of this title," if the circuit councils have the power to "nullify a local rule at any time," as claimed by the Advisory Committee on Civil Rules, 98 F.R.D. 337, 373 (1983), but I can see no reason to include all § 332(d)(1) orders. More fundamentally, I am not convinced that the councils have such sweeping power and even less sure that inconsistency with a Federal Rule is a ground upon which such power as the councils do have under § 332 can be exercised. Indeed, it is not clear that the bill, in providing for "preliminary review by the circuit judicial councils," contemplates the exercise of a power to abrogate, if it exists, by the councils as opposed to the Conference. The bill should

clarify the intended role of the councils and the power of the Conference upon a finding of inconsistency. Although the courts can invalidate a local rule on that basis, there are disincentives to challenge by litigants, and thus there is a need for power in the Conference to disapprove inconsistent rules. Compare 28 U.S.C. §§ 331 and 372(c)(11).

I am puzzled by the reference to "[the councils'] advisory committees created under Section 333 of this title." To my knowledge, that section deals exclusively with judicial conferences of the circuits. 28 U.S.C. § 2077 requires the courts of appeals to appoint advisory committees. Their formal mandate, however, is to make recommendations regarding "the rules of practice and internal operating procedures of the court of appeals." I regard the restricted statutory role as unfortunate, and the Third Circuit uses its advisory committee to advise more broadly. But that is a matter of choice.

Finally, I would again draw your attention to the recently proposed amendment to Federal Rule of Civil Procedure 83, which deals with some of the matters covered here in an apparently inconsistent manner.

6. Proposed Section 4

a. As noted above, 28 U.S.C. § 331 requires attention.

b. If Congress were to take my approach to § 2072, it could strike § 636(d).

I look forward to following the history of the bill. Please let me know if I can be of further assistance.

Sincerely,

Stephen B. Burbank
Associate Professor of Law
and Associate Dean

SBB/mod

Encl.

DRAFT § 2072

The Judicial Conference shall have the power to prescribe by general rules the practice and procedure of the district courts and courts of appeals of the United States in civil cases, including admiralty and maritime cases and cases before magistrates and appeals to district courts therein, in cases under Title 11, in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers, and the Conference shall have such power in criminal cases and proceedings to punish for criminal contempt of court in the district courts and courts of appeals of the United States, in the district courts for the District of the Canal Zone and the Virgin Islands, and in the Supreme Court of Puerto Rico, including proceedings before magistrates and appeals to district courts therein. Such rules shall neither abridge, enlarge or modify any substantive right.

UNIVERSITY of PENNSYLVANIA
PHILADELPHIA 19104

The Law School
3400 Chestnut Street I4

July 14, 1983

Thomas Hutchinson, Esq.
House Annex #2, Room 42-362
Washington, D.C. 20515

Dear Tom,

I am happy to respond to your request for comments on the confidential discussion draft of a bill to amend the Rules Enabling Acts. I am sorry that, for the present, I can only give you my first impressions.

1. The Proposal to Replace the Supreme Court With the Judicial Conference

At the start, the draft bill presents the questions whether the Supreme Court should be relieved of its supervisory court rulemaking responsibilities, and if so, what is the best replacement. I understand that the Court is not opposed to being relieved of those responsibilities. Certainly, the common perceptions that the Court acts primarily as a rubber stamp, that its role as rule promulgator has prevented it from being "zealous" in "correcting its mistakes, if any has been made," see Burbank, "The Rules Enabling Act of 1934," 130 U.Pa. L. Rev. 1015, 1178-79 (1982), and that friction with Congress over proposed rules and amendments has harmed or holds the potential for harming the institution, furnish strong arguments for that course. But changes in the infrastructure and process of supervisory court rulemaking should diminish the costs of Supreme Court involvement; attention by the rulemakers to what might be called the substantive jurisprudence of rulemaking would, I believe, reduce them further. See id. at 1193. Moreover, it remains to consider the benefits of present arrangements. Would rules promulgated by the Judicial Conference or some other body command the same respect within the federal system, so as to be applied in letter and spirit by federal

judges? Would they attract emulation by the states, so as to foster national uniformity? I do not offer answers to these questions, but I believe they deserve further exploration at congressional hearings.

If it appears that the Supreme Court should be relieved of its supervisory court rulemaking responsibilities, the choice of the Judicial Conference as its replacement, although obvious, should not for that reason pretermit consideration of the legal and prudential questions raised by the proposal or serious attention to alternatives.

As for the legal question, I know that the American Bar Association's Section on Criminal Justice has expressed the view that there could be no serious constitutional objection to a congressional delegation to the Conference. With diffidence, because I am not a constitutional law scholar, I am not so sure. The constitutional framework of federal court rulemaking is murky at best. See Burbank, supra, at 1114-21. For that reason alone, the question should be addressed at congressional hearings by those more conversant than I with the Court's cases on separation of powers.

As for prudential questions, it is important to recognize that, in replacing the Court with the Conference, the draft bill is substituting one rubber stamp for another. The potential costs of friction and of prejudgment, addressed above in connection with the Court, are reduced or avoided, but could they not similarly be avoided, with the possibility of greater benefits, if the task were delegated to some other body? In that regard, it is interesting to note that the commission idea advanced by Professor Lesnick (and rejected by the ABA) echoes a proposal made by Chief Justice Taft in 1922. See Burbank, supra, at 1070, 1196 n.780. But Taft's proposal envisioned Supreme Court approval. I can imagine numerous objections to the commission plan, both legal (see above regarding the Conference) and prudential. My point is only that, if Congress intends comprehensively to amend the Enabling Acts, it should take the time necessary to ensure the best possible arrangements for the future.

2. Proposed § 2072

Assuming the decision is made to replace the Supreme Court with the Conference, it obviously makes sense to bring together in one place all, or as many as possible, of the existing grants of supervisory rulemaking powers. This, I take it, is what proposed § 2072 attempts to do. Although I have not had sufficient time to study the draft and I am not versed in the art of legislative draftmanship, a number of caveats occur to me:

a. The bill should include a reference to "general rules" to ensure that federal supervisory court rules are national in scope. See Burbank, supra, at 1193 n.763.

b. The bill should include the prohibition that the rules authorized may not "abridge, enlarge or modify any substantive right." Although the history of the 1934 Act makes it clear that that language has no independent significance (it reinforces limitations thought to inhere in the words "practice and procedure"), see Burbank, supra, at 1107-08, eminent scholars have argued to the contrary. The omission of this language, even though it has been gutted by Supreme Court decisions, see, e.g., Sibbach v. Wilson, 312 U.S. 1 (1941), and is not found in all of the Enabling Acts, might convey a misleading message to the rulemakers and the courts, particularly in light of the proposed addition of the parenthetical ("including pleading and all other such incidental matters"), which should be deleted. Moreover, retention of the basic limitation in the text would provide a firmer ground upon which to seek economy of language in omitting the other restrictions on supervisory court rulemaking in various Enabling Acts, only one of which is included in the draft bill. At least it would do so in conjunction with legislative history making clear Congress' intent to preserve such restrictions. See, e.g., 18 U.S.C. § 3772. As it is presently

drafted, the bill will require entirely too much clarification in legislative history.

Given the Court's consistent aggrandizement of its powers under the Enabling Acts, it would be foolish for Congress to omit from the statute the major limitation on the rulemakers' powers. Indeed, as you know, I believe the rulemakers should formulate "standards or guidelines delineating the proper spheres of [their] activity" under the Enabling Acts. Burbank, supra, at 1195. Such a statement could be very useful to Congress in this enterprise.

Finally in this aspect, it may be necessary to give more thought to the treatment of the Federal Rules of Evidence in light of the history preceding their passage as a statute and the older history suggesting an (unnecessarily) restrictive view of rulemaking power under the 1934 Act. See id. at 1137-44.

c. Unless you are satisfied that you understand the historical reasons for the formulation of rulemaking grants in the Enabling Acts, there is some risk in the degree of compression of the draft bill. As an obvious example, what about the district courts for the District of the Canal Zone and the Virgin Islands and the Supreme Court of Puerto Rico, all of which are included in the grants made in 18 U.S.C. §§ 3771 and 3772 (but not in the other Enabling Acts)? It may be worthwhile to sacrifice some economy to ensure against inadvertent omission. I suggest starting with a draft that includes all of the grants and deleting language only when it is clear that you are losing nothing by doing so. Enclosed is my hasty effort. I am sure it can be improved.

3. Proposed § 2073

a. Should this provision be, instead, an amendment to 28 U.S.C. § 331? In any event, something needs to be done about this section.

b. In connection with (b)(1), you need to sort out the place of magistrate rules.

c. I would not confine the Standing Committee as suggested in (b)(2), and I note in any event that the "promote the interest of justice" language is broader than the stated consistency criterion. Remember that you can expect little substantive review by the Conference itself and that the injunction to appoint broadly representative advisory committees is unlikely to achieve much. A goal here, presumably, is to get Congress out of the business of routinely reviewing supervisory court rules on the merits. Why eliminate a possible check on advisory committee over-reaching (or poor judgment)?

d. Notice and comment, public hearings and - if it be wise - more representative advisory committees are surely enough to meet any legitimate public accountability concerns. There are risks in assimilating the rulemaking process to the legislative process. One of them is that decision-making in the sunshine will be at best a formality and at worst an exercise in hypocrisy. Another is that, through the linkage of open meetings and publicly available transcripts, litigants will be provided with a fertile source of mischief. As a scholar I found the original Civil Rules Advisory Committee's papers very useful. See Burbank, supra, at 1132-33 n.529. But use by attorneys is a different matter. Indeed, Chief Justice Hughes ordered the official papers of the original committee sealed precisely to prevent use by litigants. I would delete proposed (c)(1) and (2).

4. Proposed § 2074

a. In connection with (a), you will want to consider the rhythm of Judicial Conference business.

b. I believe (a)(2) is redundant insofar as it refers to Supreme Court rules promulgated under § 2071.

c. The preservation in (b) of the restriction in § 2076 is bound to raise questions about other restrictions in the various Enabling Acts that are not mentioned. Again, however, it is not clear that including the "abridge, enlarge, or modify" language will fill the bill because of the history of the Federal Rules of Evidence.

5. Proposed Section 3

a. § 2071 requires another amendment, referring as it does to rules "prescribed by the Supreme Court."

b. I have doubts about involving the judicial councils of the circuits, and I am puzzled by the reference to "section 333 of this title."

c. If you decide to keep the requirement regarding § 332(d)(1) orders, why not include § 372(c)(15) orders?

6. Proposed Section 4

a. As noted above, 28 U.S.C. § 331 requires attention.

b. If you were to take my approach to § 2072, you could strike § 636(d).

I look forward to following the history of the bill. Please let me know if I can be of further assistance.

Sincerely,

Stephen B. Burbank

SBB/ec
Enc.

Draft § 2072

The Judicial Conference shall have the power to prescribe by general rules the practice and procedure of the district courts and courts of appeals of the United States in civil cases, including admiralty and maritime cases and cases before magistrates and appeals to district courts therein, in cases under Title 11, in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers, and the Conference shall have such power in criminal cases and proceedings to punish for criminal contempt of court in the district courts and courts of appeals of the United States, in the district courts for the District of the Canal Zone and the Virgin Islands, and in the Supreme Court of Puerto Rico, including proceedings before magistrates and appeals to district courts therein. Such rules shall neither abridge, enlarge or modify any substantive right.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

5 MAR 1984

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on H.R. 4144, the "Rules Enabling Act of 1983." For the reasons discussed below, the Department recommends against enactment of this legislation.

I. Summary of the Bill

H.R. 4144 would revise the procedures for promulgation of the Federal Rules of Civil, Criminal, and Bankruptcy Procedure and of the Federal Rules of Evidence. It would consolidate all rules enabling provisions into an amended 28 U.S.C. § 2072. The Supreme Court would be relieved of the responsibility for issuing rules of procedure and evidence, and that authority would be transferred to the Judicial Conference of the United States. The existing delayed effective date procedure would be retained, but instead of 90 days (180 for rules of evidence) a deferred effective date of nine months would be substituted. The legislative veto provision in the enabling statute governing the rules of evidence would be repealed. Current language forbidding any modification of a substantive right in connection with amendments to the civil and bankruptcy rules would be omitted. The requirement that the bankruptcy rules be consistent with other laws would be eliminated.

The bill contains a number of provisions directed to the rulemaking process for which there is no current counterpart. The Judicial Conference would be required to establish separate advisory committees on civil, criminal, bankruptcy, appellate, and evidence rules. The term of a committee member would be five years and a member could serve for no longer than ten years. Any meeting of an advisory committee would have to be open to the public unless the committee determines in open session to close the meeting. Transcripts of public meetings would have to be prepared and made available to the public.

H.R. 4144 would also require the Judicial Conference to compile periodically the local rules adopted by the various fed-

eral courts and any orders of the circuit councils. After a preliminary review by the circuit councils, the Judicial Conference would periodically review such rules and orders for consistency with the Federal Rules.

II. Discussion

The Department of Justice takes no position on the proposed elimination of the Supreme Court's role in the rulemaking process, and instead defers to the views of the Supreme Court and the Judicial Conference. However, if it is decided to reduce the Supreme Court's role, we would suggest that consideration be given to retaining rulemaking authority in the Court, while authorizing the Court to delegate the responsibility to the Judicial Conference.

We oppose the bill's detailed provisions regarding committee structure and operating procedures. The bill appears to mandate establishment of the various advisory committees, even when a committee may not be necessary. Furthermore, the ten-year statutory limitation on membership terms might create transition problems if members are forced out of a committee during a critical stage of rule drafting or consideration. We believe that the creation and composition of the rules committees should be left within the discretion of the Judicial Conference.

The open meetings provision of the bill, proposed 28 U.S.C. § 2073(c), would impose requirements that would make the rulemaking process more complex and lengthy. We believe that the requirement of open public meetings would inhibit the candor and free exchange of ideas necessary to the consideration of controversial rule proposals and effective rule drafting. In addition, rules may be subject to procedural challenges if the open meeting provisions are not strictly followed. In our view, the current system is working well; moreover, the Judicial Conference's recently adopted Statement of Operating Procedures is designed to encourage public participation in the rulemaking process.

Extending the existing 90-day deferred effective date to nine months is also objectionable. The rulemaking process is already extraordinarily slow. However, like the Judicial Conference, we could support a compromise that would extend the minimum time for congressional review of proposed rules amendments to six months. We also join the Judicial Conference in its opposition to the provision in H.R. 4144 that would require rules amendments to be transmitted to the Congress by March 15 of a given year instead of May 1.

Finally, we are concerned about the bill's elimination of the proscription currently contained in the civil and bankruptcy rules against modification of substantive rights. For example, current section 2072 of title 28 contains the following statement:

> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

We urge that restrictive language along the lines of the above-quoted sentence be retained in the Rules Enabling Act, because its deletion might invite judicial rulemaking that would abridge substantive rights, or at least cause confusion that might result in increased litigation. Since proposed section 2074 would provide that any rule promulgated by the Judicial Conference "shall supersede -- (1) any contrary provision of law then in effect," absence of the proscription against modifying substantive rights might be viewed by some (judges or litigants) as an invitation to the courts to legislate. 1/

We do not believe that in fact the bill's elimination of the restrictive language would enlarge the authority of the Judicial Branch to engage in rulemaking. The authority granted by H.R. 4144 to the Judicial Conference is only "to prescribe rules of practice and procedure." The limiting language in existing section 2072 of title 28 can most reasonably be interpreted merely as the converse of that affirmative grant of authority. Thus, even without such language, we believe that under this bill the Judicial Conference would not have any greater authority than is now granted to the Supreme Court under the current Rules Enabling Acts. Moreover, we note that even in the absence of explicit language in an Enabling Act, the courts have enforced limitations on their rulemaking authority that have roots in

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1/ The history of the bankruptcy rules is illustrative. The Bankruptcy Reform Act of 1978, Pub. L. 98-598, Sec. 247, repealed the authorization for the issuance of bankruptcy rules inconsistent with the provisions of other laws. The Justice Department supported the repeal, contending that a large number of procedural rules inconsistent with the statutory procedures had been issued, causing a great deal of confusion. Bankruptcy Act Revision, Hearing before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary., 94th Cong., 2d Sess. at 2107 (1976). A similar view was expressed by the Securities and Exchange Commission. Ibid. at 2205-06. The concerns of the Department and the SEC were prompted by the extensive revisions of the bankruptcy rules in 1973 and 1975, which superseded many provisions of the Bankruptcy Act. In drafting the Bankruptcy Reform Act of 1978, Congress attempted to remove many procedural matters from the bankruptcy statute and decided that the judiciary should not have the power to amend the Bankruptcy Code through the rules process. H. Rep. No. 95-595, 95th Cong. 1st Sess. pp. 292-93; S. Rep. No. 95-989, 95th Cong., 2d Sess. pp. 157-58.

separation of powers considerations, 2/ and we assume the Judicial Conference and the courts would continue to be sensitive to those considerations in the exercise and interpretation of the rulemaking authority.

Nonetheless, although we do not believe that repeal of the language in section 2072 would actually enlarge the rulemaking authority of the Judicial Branch, we recognize that the repeal could possibly be interpreted by some as an indication of congressional intent to do so. Since it must remain clear that the legislating function resides only in Congress, we recommend that some language explicitly preventing judicial rulemaking from modifying substantive rights be included in any Rules Enabling Act.

III. Conclusion

In conclusion, the Department of Justice recommends against enactment of H.R. 4144. We believe the bill would preclude the flexibility necessary for judicial rulemaking. It would impose additional burdens on the rulemaking process and create the possibility of litigation challenging federal rules, not on their merits, but on the basis of alleged violations of these proposed procedural mandates. We believe these matters should be left to the discretion of the Judicial Conference rulemaking bodies.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

2/ For example, it has been held consistently that the Supreme Court cannot, through the exercise of the rulemaking power, enlarge, modify, or restrict the jurisdiction of the federal courts. See, e.g., Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941); Bendix Aviation Corp. v. Glass, 195 F.2d 267, 270 (3d Cir. 1952); Standish v. Gold Creek Mining, 92 F.2d 662, 663 (9th Cir. 1937).

STATE OF CONNECTICUT
SUPREME COURT

CHAMBERS OF
JOHN A SPEZIALE
CHIEF JUSTICE

DRAWER N, STATION A
HARTFORD, CT 06106

March 6, 1984

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
2137 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

Enclosed is a resolution on H.R. 4144, The Rules Enabling Act of 1983, adopted by the Conference of Chief Justices at its recent Midyear Meeting. It addresses only that provision of the legislation which would remove the Supreme Court's rule-making authority and vest it in the Judicial Conference of the United States.

The Conference of Chief Justices has no objection to the Judicial Conference acting, as it now does in conjunction with the Administrative Office of the United States Courts, as the agency which formulates the rules, distributes them for comment, and proposes them to the Supreme Court. This is a necessary and proper procedure followed by many states where Judicial Councils and advisory rules committees fill the role played by the Judicial Conference. But we feel very strongly that the rule-making power is an inherent power necessary to the functioning of the judicial branch of government and that this power should be vested only in the Supreme Court itself. Thus, we would support an amendment to H.R. 4144 that would simply authorize the Supreme Court to delegate its rule-making authority to the Judicial Conference.

As the resolution indicates, the federal rules are widely used by state supreme courts as de facto model rules. This is because uniformity contributes in many ways to the more effective operation of both court systems. Federal rules are

The Honorable Robert W. Kastenmeier March 6, 1984

so important to state systems, in fact, that the Committee on State-Federal Relations of the Conference of Chief Justices recently created a Subcommittee on Federal Rules in the belief that state supreme courts should be involved more effectively in the federal rulemaking process. The resolution on H.R. 4144, adopted by the Conference without dissent, is a product of our new Subcommittee on Federal Rules which is under the chairmanship of Chief Justice Vincent L. McKusick of the Supreme Judicial Court of Maine.

The closeness of the state-federal relationship on rules is illustrated by the comments, also enclosed, of the Judicial Council of Wisconsin on the pending amendments to the federal rules. These were prepared for Chief Justice Nathan S. Heffernan of Wisconsin, a member of our Subcommittee on Federal Rules. The Subcommittee has sent its comments on the pending amendments to the Judicial Conference Committee on the Rules of Practice and Procedure.

The third member of our Subcommittee on Federal Rules is Chief Justice William H. Erickson of the Colorado Supreme Court. Chief Justice Erickson has within recent months published a thoughtful article on the problems encountered by both state and federal courts in making local rules and has explained the statewide "practice standards" recently adopted in Colorado. See Erickson, Colorado's Answer to the Local Rules Problem, 16 U. Mich. J.L. Ref. 493 (1983).

It is my understanding that your subcommittee is conducting hearings on H.R. 4144. We would, therefore, appreciate it if this letter and the enclosed materials could be included in the hearing record. We also would be pleased to respond to any questions you might have.

Very truly yours,

John A. Speziale

John A. Speziale, Chairman
Committee on State-Federal Relations
Conference of Chief Justices

JAS:pdw
enclosures
cc: Chief Justice Ralph J. Erickstad
Chief Justice W. Ward Reynoldson
Chief Justice Vincent A. McKusick
Chief Justice Nathan S. Heffernan
Chief Justice William H. Erickson
Harry W. Swegle

PROPOSED RESOLUTION XII

Amendments to Federal Rules

WHEREAS, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has published for comment currently proposed amendments to the rules of practice and procedure applied in the federal courts in civil and criminal cases and in section 2254 and 2255 proceedings; and

WHEREAS, the Conference of Chief Justices has examined those proposed amendment from the point of view of promoting the desirable goals of uniformity between federal and state procedural rules and of harmonious state-federal relations;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports the adoption of the following proposed amendments:

A. The Conference of Chief Justices supports the proposed amendments of Federal Civil Rule 83 relating to local rules of each federal district court, since the proposed amendment's requirement that the federal district court give "appropriate public notice and an opportunity to comment" should lead to the proper consideration of desirable procedural uniformity between state and federal trial courts in the same state.

B. The Conference of Chief Justices supports the proposed addition of Federal Criminal Rule 6(e)(3)(C)(iv) to permit disclosure of federal grand jury information to state officials for the purpose of promoting the enforcement of state criminal law.

C. The Conference of Chief Justices supports the proposed amendment of Federal Criminal Rule 30 so as to permit a federal district court to instruct the jury either before or after final arguments of counsel, thus enabling the federal court to follow whatever practice in that regard prevails in the state trial courts in the same state.

D. The Conference of Chief Justices supports the proposed amendment to Rule 9(a) of the Rules Governing Section 2254 cases in the United States District Courts to extend the laches rule to cover situations where the delay in filing the habeas corpus petition has prejudiced the state in its ability to retry the petitioner.

BE IT FURTHER RESOLVED, that the Conference of Chief Justices oppose the first of the proposed amendments to Federal Civil Rule 6(a) by which in computing any period of time the last day of the period for filing a paper would not be counted if it was "a day on which

weather or other conditions have made the office of the clerk of the court inaccessible," for the reason that the Conference believes the proposed amendment is unnecessary in light of the "excusable neglect" escape provision of the rules and would likely result in burdensome factual litigation, as well as undesirable nonuniformity between state and federal rules on computation of time.

Proposed by the State Federal Relations Committee of the Conference of Chief Justices at the Seventh Midyear Meeting in New Orleans, Louisiana on February 8, 1984.

PROPOSED RESOLUTION X

Reporting of Attorney Discipline

WHEREAS, many attorneys are now licensed to practice, and in fact do regularly practice, in more than one State and in many different federal courts; and

WHEREAS, it is essential that all licensing authorities, state and federal, have available information on disciplinary actions taken by licensing authorities against attorneys licensed under their jurisdiction; and

WHEREAS, it appears from the reports of the National Discipline Data Bank maintained by the American Bar Association that some federal and state courts are not reporting public disciplinary actions to the Data Bank;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices recommend to any state or federal court exercising disciplinary authority over attorneys that (1) it report all private and public discipline taken against any attorneys to all other licensing authorities with jurisdiction over the attorneys so disciplined, and (2) it report all public attorney discipline imposed by it to the American Bar Association National Discipline Data Bank, including public discipline imposed over the past five years unless previously submitted.

Proposed by the State Federal Relations Committee of the Conference of Chief Justices at the Seventh Midyear Meeting in New Orleans, Louisiana on February 8, 1984.

PROPOSED RESOLUTION VIII

Guidelines for Judicial Education Programs

WHEREAS, it is generally recognized that programs of educational training for judicial officers are essential to the proper administration of justice; and

WHEREAS, the primary purposes of these programs should be to instruct new judicial officers in their duties and to keep other judicial officers abreast of developments in the law,

NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices that the following guidelines are recommended for effective programs of judicial education:

1. Scope of Judicial Education.

   A. A program be established in each jurisdiction to instruct new judicial officers in their duties. Each new judicial officer be required to attend the program as soon as possible after his or her qualification and, perferably, before hearing cases, but, in any event, within one year after qualification.

   B. Within two years after his or her qualification, each new judicial officer be required to attend a general program of judicial education, consisting of instruction for a minimum of forty hours.

   C. Whether or not the attendance requirements of paragraphs 1(A) or 1(B) are satisfied, each judicial officer should be required to attend in every three-calendar-year period a program of general judicial or legal education, consisting of instruction for a minimum of forty hours.

   C. In addition to the programs prescribed in paragraphs 1(A), 1(B), and 1(C), each judicial officer be encouraged to attend national or regional programs of judicial and legal education.

2. Provisions for Judicial Education.

As indicated, the program prescribed by paragaph 1(A) be furnished in each jurisdiction. The programs prescribed by paragraphs 1(B), 1(C), and 1(D) may be furnished either within or without the jurisdiction.

3. Leave and Expenses.

A. For attendance at programs required by these guidelines, educational leave be allowed and compensation for travel and living expenses should be provided.

B. For attendance at programs made optional under these guidelines, educational leave be allowed and compensation for travel and living expenses may be provided.

4. Faculty Service.

Effective programs of judicial education depend upon the active participation of judges as faculty members It is recommended that, with the approval of the chief justice, each judicial officer who serves on the faculty of a judicial education program be granted educational leave for such service.

5. Judicial Education Board.

It is recommended that, in each jurisdiction, a judicial education board be established by the court whose representative is entitled to vote in the Conference of Chief Justices. This board should be authorized to determine education policy, to consider and prepare budget requests for judicial education, and to approve or disapprove any program for which educational leave is allowed or expenses are provided under these guidelines. If no education board exists, the chief justice should approve or disapprove any such program.

Proposed by Education Committee of the Conference of Chief Justices at the Seventh Midyear Meeting in New Orleans, Louisiana on February 8, 1984.

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

Edward B. McConnell
Executive Director

June 6, 1984

Mr. David Beyer
Committee of the Judiciary
House of Representatives
2137B Raeburn
Washington, DC 20515

Ref. No. RIS 84.056

Dear Mr. Beyer:

In response to your request for information about open hearings in connection with judicial rulemaking, and the requirement of legislative approval of court rules, enclosed are excerpts from Judicial Rulemaking: Administration, Access and Accountability, (Charles W. Grau, American Judicature Society, 1978).

In the excerpt of pages 17-21, the author discusses court/legislative relations with respect to rulemaking, and Column 4 of Table II-2 indicates that only in Georgia and Tennessee is legislative approval required before a court rule becomes effective.

We have checked Table IV-4 (page 58) with the information on open hearings contained in the new, 1984, Judical Rulemaking: A Compendium, (Pugh, Korbakes, Alfini and Grau, American Judicature Society). According to this source 23 states use open hearings in their rulemaking procedure and 5 other states may use open hearings, though the 1984 publication does not always confirm the data in the Open Hearings column as to these five.

I hope this will be helpful to you. In exchange for our services we ask that you complete and return the enclosed evaluation form.

Please contact us if we can be of further assistance to you.

Sincerely,

Marilyn M. Roberts

Marilyn M. Roberts
Research and Information Service
Director

MMR/bl
encls.
cc: Mr. James R. James, Southeastern Regional Office
Mr. Larry Polansky, Exec. Officer of the District of Columbia Courts

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Judicial Rulemaking: Administration, Access and Accountability

Charles W. Grau
A research project of the
American Judicature Society

The commentators differ somewhat in the precise conditions and form of legislative intervention in procedural rulemaking. The scheme envisioned by Joiner and Miller is the least detailed and most restrictive of legislative intervention. They suggest that legislative intervention depends upon the presence of legislative or constitutional policy matters other than the orderly dispatch of judicial business. In the area of procedure, they recommend that courts allow legislative excursions until the court preempts the field.[42] Levin and Amsterdam suggest more elaborate and less restrictive grounds for legislative participation. They maintain that the legislature should have the power to review, but that its power be exercised only upon due deliberation and be subject to periodic reappraisal.

Weinstein describes arrangements which are only mildly restrictive of legislative participation. As outlined above, he feels that the legislature should be precluded from actually drafting rules, but should be allowed to disapprove them by joint resolution within a fixed period.[43]

Several elements of court/legislative relations with respect to procedure can be identified from the literature, in order to conceptualize the issues and to categorize the states according to the modes of relation they have adopted. While such an inquiry does not decide the wisdom of any approach, it does test Kaplan and Greene's hypothesis that there has been "a growing recognition of the soundness of the policy of vesting comprehensive rulemaking power in the courts, with accountability in the legislature."[44] The elements are:

1) whether the supreme court has authority to adopt procedural rules;
2) whether this authority is constitutional, statutory, or inherent;
3) whether the legislature may disapprove court rules (and by what size majority);
4) whether the legislature may refuse to approve court rules;
5) whether the legislature may amend court rules;
6) whether the legislature may adopt procedural statutes; and
7) when procedural rules and statutes conflict, which prevails.

A comparison of the states along these dimensions is presented in Table II-2.

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[42] Levin and Amsterdam, supra, n. 15 at 630, 653.

[43] Weinstein, supra, n. 20 at 109, 110, 147.

[44] Kaplan and Greene, supra. n. 33 at 251.

TABLE II - 2
Legislative Authority Over Procedural Rulemaking

	1. Ct. may adopt rules	2.+ Source	3. Leg. may dis-ap-prove	4. Leg. may refuse approval	5. Leg. may repeal	6. Leg. may amend	7. Leg. may adopt procedural statutes	8.++ Gov-ern-ing rule
ALABAMA	X	C,S,I				X	X	S
ALASKA	X	C				X	X	
ARIZONA	X	C,S					X	R
ARKANSAS	X	S					X	R
CALIFORNIA		C,I**					X	S
COLORADO	X	C,S					X	R
CONNECTICUT	X	C,I					X	R
DELAWARE	X	S					X	R
FLORIDA	X	C			X		X	R
GEORGIA	X	S,I		X			X	
HAWAII	X	I,C					X	R
IDAHO	X	S					X	
ILLINOIS	X	I,S					X	R
INDIANA	X	S				X	X	R
IOWA	X	S				X	X	R
KANSAS	X	S					X	
KENTUCKY	X	C					X	
LOUISIANA	X	C					X	S
MAINE	X	S,I					X	R
MARYLAND	X	C			X	X	X	R
MASSACHUSETTS	X	S					X	
MICHIGAN	X	C					X	R
MINNESOTA	X	C			X	X	X	R
MISSISSIPPI	X	S					X	
MISSOURI	X	C			X	X	X	R
MONTANA	X	C	X*				X	
NEBRASKA	X	C					X	S
NEVADA	X	I,S					X	
NEW HAMPSHIRE	X	I,S					X	
NEW JERSEY	X	C					X	R
NEW MEXICO	X	S					X	R
NEW YORK		S***	X		X	X	X	
NO. CAROLINA	X	C,S			X	X	X	S
NO. DAKOTA	X	C,S					X	
OHIO	X	C	X*				X	R
OKLAHOMA	X	S					X	
OREGON		S**			X	X	X	R
PENNSYLVANIA	X	C					X	
RHODE ISLAND	X	S					X	R
SO. CAROLINA	X	C					X	
SO. DAKOTA	X	C				X	X	
TENNESSEE	X	S		X			X	R
TEXAS	X	C			X		X	S
UTAH	X	C					X	R
VERMONT	X	C			X	X	X	R
VIRGINIA	X	C					X	S
WASHINGTON	X	C,I,S					X	R
WEST VIRGINIA	X	C,I					X	R
WISCONSIN	X	I,S			X	X	X	
WYOMING	X	S					X	
N =	47	-	3	2	10	13	50	-

* A time limit has been imposed.
** In these states judicial rulemaking authority is vested in a judicial council.
*** In New York, rulemaking authority is vested in a Judicial Conference.
\+ C = Constitutional; S = Statutory; I = Inherent
++ S = Statute prevails; R = Rule prevails

The first two columns of Table II-2 indicate whether the supreme court has rulemaking authority and whether the source is constitutional or delegated by the legislature. Where the source of authority is statutory, it has been delegated by the legislature. Columns three through six indicate the presence or absence of various legislative powers over judicial rulemaking. Column three shows whether the legislature has the power to disapprove (or veto) rules adopted by the court. The implication is that the rules are effective unless disapproved by the legislature. Ohio is an example of this type of arrangement. Ohio's constitution provides that procedural court rules are effective unless specifically disapproved by concurrent resolution of the General Assembly within a specified time period.[45] Only three legislatures have this authority.

Column four indicates whether legislative approval is required before a court rule becomes effective. In this case, the power of the legislature is its ability to refuse to approve a proposed rule. Because the presumption in this case is that the rule is not effective unless approved by the legislature, required approval provisions are more intrusive on the court's authority Such provisions are found in Tennessee and Georgia. Analagous to the power of disapproval is the right to repeal procedural rules (column five). This right is more obtrusive than the power to disapprove because it is a continuous power, unlike disapproval which is usually limited to a specified period after adoption. In this sense, it is also more obtrusive than required approval provisions because it is a continuing threat to the court rule. The power to repeal court rules is found in Florida, where a two-thirds vote of both houses is required. Nine other legislatures may repeal court rules.

The power to amend rules of court, indicated in column six, is also an extremely significant legislative power. As one chief justice put it:

> If the legislature had known then what they know today about the power they were to lose when they gave up authority to amend procedural rules, we wouldn't have gotten the constitutional amendment through which did it. They gave up more than they really knew they were giving up when they gave up the power to amend. Now they can make suggestions--the court can amend--but they have to take the rules all or nothing.[46]

---

[45] Ohio Const., art. IV, sec. 5 (B).

[46] AJS Rulemaking Workshop, supra, n. 14.

The power to amend is significant because it does not force the legislature into a "take-it-or-leave-it" situation—the legislature may alter the rule. One state where the power to amend has been granted to the legislature is Missouri.[47] Intent to amend a particular rule must be specific, however.[48] Altogether, legislatures in twelve states may amend court rules.

The power of the legislature to adopt procedural statutes is even more significant than the power to amend because it allows the legislature to act in procedural areas untouched by the court. In this way, it facilitates legislative reform of procedure that many commentators feel is needed. The significance of this power is enhanced when procedural statutes supercede court rules (column seven). The power is of less significance when court rules supercede procedural statutes because the court's authority is superior. Rules are superior in 25 states. In effect, the legislature can only regulate procedure in areas which the court has not pre-empted.

A number of conclusions may be drawn from Table II-2. In forty-seven of the fifty states the supreme court has substantial procedural rulemaking authority. Moreover, the predominant source of this authorty is constitutional. In thirteen states, however, the authority is solely statutory. By delegating rulemaking authority to the court, the legislature takes advantage of judicial expertise and proximity to procedural problems. At the same time, it maintains judicial accountability with the threat of revoking judicial rulemaking authority.

Most states have reserved significant rulemaking powers in the legislatures. There is, of course, wide variation in the scope and significance of the powers retained by the legislature. Legislative involvement in the rulemaking process ranges from nearly nothing in New Jersey to near complete supremacy in California and Oregon. Most states, however, are characterized by a sharing of responsibility between the courts and legislatures. In this respect, the states have structured rulemaking processes similar to those generally recommended by the commentators. It appears that Kaplan and Greene were correct when they suggested that the modern trend in procedural rulemaking was to vest comprehensive rulemaking authority in the courts while maintaining accountability in the

---

[47] State v. Fleming, 451 S.W.2d 119 (Mo. 1970).

[48] Id.

legislatures.

The viability of these arrangements between courts and legislatures is strongly suggested by the absence of conflict between the branches. In 1974, thirty-two states reported no conflicts had occurred over court rules; seven had conflicts in only one rulemaking area; and only five experienced conflicts in two areas. A 1974 study concluded:

> When conflicts do arise, courts and legislatures generally take care to avoid the possibility of precipitating a constitutional confrontation by seeking some acceptable middle ground. . . both the courts and the legislatures have worked to avoid friction.[49]

More recent data indicate that, within the past thirty years, legislatures have superseded or attempted to supersede court rules by enacting contrary statutes or resolutions in only fourteen states. Only ten supreme courts have noted opposition to various administrative rules. Of these, opposition from the legislature was cited only once.[50]

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[49] AJS, supra, n. 16 at 117.

[50] American Judicature Society Questionnaire.

TABLE IV - 4
State Rulemaking Procedures

State	Prior Publication	Comment Period	Open Hearings	Supreme Court Committees	Published Rulemaking Procedures
ALABAMA	X	X	X	X	
ALASKA	X	X	X	X	
ARIZONA		X		X	
ARKANSAS	X	X		X	
CALIFORNIA					
COLORADO	X		X	X	
CONNECTICUT			X		
DELAWARE	X	X		X	
FLORIDA	X	X	X	X	X
GEORGIA					
HAWAII	X			X	
IDAHO			X	X	
ILLINOIS	X	X		X	
INDIANA	X		X		
IOWA				X	
KANSAS	X		X ?	X	
KENTUCKY	X		X ?		
LOUISIANA		X	X	X	
MAINE	X	X	X	X	
MARYLAND	X	X	X	X	X
MASSACHUSETTS	X	X	X	X	
MICHIGAN	X	X	X	X	
MINNESOTA	X	X	X	X	
MISSISSIPPI	X		X		
MISSOURI	X	X		X	
MONTANA	X	X		X	
NEBRASKA					
NEVADA (1)	X	X	X	X	X
NEW HAMPSHIRE	X	X		X	
NEW JERSEY	X	X		X	
NEW MEXICO	X	X		X	
NEW YORK	X	X			
NO. CAROLINA					
NO. DAKOTA (2)	X	X	X	X	X
OHIO	X	X	X 1/2	X	
OKLAHOMA	X		X ?		
OREGON					
PENNSYLVANIA					
RHODE ISLAND	X		X		
SO. CAROLINA					
SO. DAKOTA	X	X	X	X	
TENNESSEE	X		X	X	
TEXAS	X		X		
UTAH			X	X	
VERMONT	X	X	X	X	
VIRGINIA	X				
WASHINGTON	X	X		X	
WEST VIRGINIA	X		X	X	
WISCONSIN (3)	X	X	X	X	X
WYOMING	X			X	

N = 48 Pennsylvania and Nebraska did not respond to questionnaire.

(1) Nevada's procedures apply only to administrative rules and orders. Access to the process is limited to court system personnel.

(2) North Dakota employs the same procedure for both administrative and procedural rules.

(3) Wisconsin has separate procedures for procedural and administrative rules. Both, however, include all procedures indicated here.

Source: AJS Questionnaire

AMERICAN CIVIL LIBERTIES UNION

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Burt Neuborne
LEGAL DIRECTOR

June 12, 1984

David Beier
Counsel, Subcommittee on Courts
Civil Liberties and the
Administration of Justice
U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

Dear David,

Thanks for the Rules Enabling material.

The National Center for State Courts' letter, while probably accurate, is irrelevant, since, in many states, Courts do not promulagte basic rules of procedure in the first place. For example, both California and New York do not use a court promulgated set of procedures. Rather, the CPLR (in New York) and the Civil Practice Code (in California) were passed by the state legislatures. A more interesting question for the Center would be:

> How many states allow the courts to promulgate the basic rules of civil procedure in the form of court rules and how many use the state legislature to enact the basic rules?

As I'm sure you know, the Court has agreed to review Judge Posner's decision on the relationship between the attorneys fee act and Rule 68. I assume that the case will produce a major opinion on the Court's power to promulgate rules.

Sincerely,

Burt Neuborne

BN:itm

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

Edward B. McConnell
Executive Director

July 31, 1984

Mr. David Beier
House Judiciary Committee
2137-B Rayburn House Office Bldg
Washington, DC 20515

Ref. No. RIS 84.065

Dear Mr. Beier:

Enclosed is a staff memorandum (RIS 84.065) with attachments prepared in reaponse to your request for information on promulgation of state court rules of civil procedure in the fifty states.

I hope this will be helpful to you.

In exchange for our services, we ask that you complete and return the enclosed evaluation form.

Please contact us if we can be of any further assistance to you.

Sincerely,

Marilyn M. Roberts
Research and Information Service
Director

MMR:caw
Encls.

cc: Mr. James R. James, Southeastern Regional Office
Mr. James R. Larsen, Court Administrator, Supreme Court of Washington

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

Edward B. McConnell
Executive Director

July 31, 1984

MEMORANDUM

REF. NO. RIS 84.065

BY: Dixie Knoebel

RE: Promulgation of Rules of Civil Procedure

The Research and Information Service was asked to provide information on promulgation of state court rules of civil procedure in the fifty states. Attached is a table that lists by state rules of civil procedure promulgated by court rule or statute, with accompanying explanation where appropriate. This information has been compiled from Judicial Rulemaking: A Compendium, American Judicature Society, 1984.

It appears that most rules of civil procedure are promulgated by court rule (46 states). In sixteen of those states, the legislature plays a role with power to ratify, amend, or repeal court rules. Court rules supersede conflicting statutes in fifteen states, while in six states the legislature has expressly specified that rules may not conflict or be inconsistent with laws of that state.

The above referenced publication also provides a table indicating the basis of the court's authority to promulgate rules of civil procedure. Explicit constitutional authority is provided for in 21 states; explicit statutory authority is given in 19 states, and in seven states the authority is based on the inherent power of the court as an independent branch of government (see table enclosed, p. 268, from Judicial Rulemaking: A Compendium).

DN:caw
Encl.

Rules of Civil Procedure Promulgated by Court Rule or Statute

State	Court Rule	Statute
Alabama	X - power is reserved to the legislature to supersede any court rules	
Alaska	X[1]	
Arizona	X - court rules supersede conflicting procedural statutes	
Arkansas	X[2]	
California	The California State Constitution vests the judicial counsel with authority to adopt rules so long as the rules do not conflict with statutes	
Colorado	X, also specified by statute[3]	
Connecticut	X	
Delaware	X[4]	
Florida	X	
Georgia	X[5]	
Hawaii	X[6]	
Idaho	X	
Illinois	X[7]	
Indiana	X - court rules prevail over conflicting statutes	
Iowa	X	
Kansas	X[8]	X
Kentucky	X - since 1976	

State	Court Rule	Statute
Louisiana	X[9]	
Maine	X[10]	
Maryland	X[11]	
Massachusetts	X[12]	
Michigan	X[13]	
Minnesota	X[14]	
Mississippi	X	
Missouri	X	
Montana	X[15]	
Nebraska		X[16]
Nevada	X[17]	
New Hampshire	X - effective November 1978	
New Jersey	X[18]	
New Mexico	X[19]	
New York		X[20]
No. Carolina	X[21]	X
No. Dakota	X	
Ohio	X[22]	
Oklahoma	X[23]	
Oregon		X[24]

State	Court Rule	Statute
Pennsylvania	X[25]	
Rhode Island	X[26]	
South Carolina	X, subject to statutory law	
South Dakota	X[27]	
Tennessee	X[28]	
Texas	X, subject to legislative action	
Utah	X[29]	
Vermont	X[30]	
Virginia	X[31]	
Washington	X[32]	
West Virginia	X[33]	
Wisconsin	X[34]	
Wyoming	X	

FOOTNOTES

1. In general, court rules invalidate conflicting procedure statutes. Court rules may be changed by a 2/3 vote of the legislature; however, legislative changes must be explicit in their intent to effect such change or they will be ineffectual.

2. The legislature has authorized the supreme court to prescribe procedural rules for all civil proceedings in all courts. Court rules supersede any conflicting statutes.

3. The court has declared that legislative grants of power to prescribe procedural rules are ineffective because the court has the inherent power to regulate its own practice.

4. Such rules supersede conflicting statutes but may not abridge, enlarge, or modify substantive rights.

5. The constitution provides that the supreme court shall adopt and publish uniform court rules. Statutes provide that rules do not take effect until ratified by the general assembly.

6. The legislature is not precluded from acting on procedural matters; however, statutes in conflict with court rules are ineffective.

7. The legislature has recognized the Supreme Court's power to make rules of procedure for all state courts, but has provided by law that such rules should not be inconsistent with the provisions of the code of civil procedure. When a statute and court rule conflict, the statute will be declared void if it represents a legislative infringement upon the supreme court's judicial powers.

8. Responsibility for procedural rulemaking rests in both the legislature and the supreme court; however, the inherent power of the court is recognized to supplement or amend the codes as they pertain to procedure as long as they do not abridge, enlarge, or modify any substantive right.

9. Courts may adopt rules governing practice and procedure, but the rules may not be contrary to those provided by law.

10. Rules made within the scope of the court's authority override conflicting statutes in the field of procedure.

11. The legislature has the power to amend or repeal court rules, but if a rule is adopted subsequent to a conflicting statute, the rule prevails.

12. The supreme judicial court may adopt rules of practice and procedure, provided that such rules do not alter substantive rights and do not conflict with any statutes. It is unclear whether the supreme judicial court of the legislature possesses the ultimate rule-making authority but the court in practice and by statutory authorization, tends to be the primary rulemaking body.

13. Rules of practice and procedure is committed exclusively to the supreme court and the legislature may not meddle or interfere with this function.

14. The legislature has expresaly reserved the right to enact, modify or repeal any rule of the supreme court adopted pursuant thereto.

15. Rules of procedure are subject to disapproval by the legislature in either of the two legislative sessions following promulgation.

16. Although rulemaking authority ultimately reats with the legislature, the supreme court has been assuming an increasing share of rulemaking responsibility. The constitution allows the supreme court to adopt uniform rules of procedure which may not conflict with governing laws.

17. These rules may not be inconsistent with the constitution and laws of the state.

18. Supreme court rules override existing legislation in the field of procedure and cannot be overridden by subsequent legislative action.

19. The supreme court has expressly ruled that the legislature has no power to prescribe rules of practice and procedure and any attempts to do so will be void.

20. The constitution gives the legislature power to regulate practice and procedure, but it may delegate this power to a court or to the chief administrator of the courts. Any such power delegated to the chief administrator must be exercised with the advice and consent of the administrative board of the courts.

21. Rulemaking power is shared by the supreme court and general assembly. The supreme court has ultimate authority for the appellate division; the general assembly has ultimate responsibility for the superior court and district court divisions. If the general assembly delegates making rules of practice and procedure for the lower court to the supreme court, it may still altar, amend, or repeal any of those rules adopted by the supreme court.

22. Where conflicts arise between procedural rules and statutory law, the rules will control the statute on procedural law. Rules become effective unless the general assembly adopts a concurrent resolution of disapproval within approximately six months of being filed with the clerks of each house of the general assembly.

23. The legislature has declared that if any rule of the supreme court is in conflict with any statute, the rule shall have no effect.

24. The Council on Court Procedures, established in 1977 by the legislature, has authority to adopt rules governing civil procedure. Rules are submitted to the legislative assembly at the beginning of each regular session and are to go into effect 90 days after the close of that session, unless otherwise stipulated. The legislature may by statute amend, repeal, or supplement any of the rules. The supreme court has some voice in that of the council's 23 members, one is a supreme court justice, one judge is from the court of appeals, six judges are from the circuit court, and two judges are from the district court.

25. All laws inconsistent with supreme court rules shall be suspended.

26. According to statute, the power to promulgate general procedural rules rests with each court. Only rules of lower courts are subject to approval of the supreme court. Court rules have the force of statute and supersede conflicting legislation.

27. Court rules may be changed by the legislature, but while in effect they have the force of statute.

28. Court rules must be approved by both houses of the general assembly before they take effect. After rules take effect, any statutes in conflict wth the rules are to be without force.

29. All laws in conflict with the rules are of no further force and effect.

30. Any rule or amendment adopted by the court may be repealed, revised, or modified by the general assembly.

31. Rules may not conflict with the general law established by the general assembly and the legislature may supersede court rules. The legislature has also authorized the supreme court to formulate rules of practice and procedure for the district and circuit courts, but only after consulting with the chairmen of the House and Senate Courts of Justice Committees and the executive committee of the Judicial Conference of Virginia.

32. All laws in conflict with rules shall be of no further force or effect.

33. The legislature cannot abridge the rulemaking power of the courts. Court rules have the force and effect of statute.

34. The legislature delegated rulemaking authority to the court, although the legislature has reserved the right to enact, modify, or repeal statutes or rules relating to procedure.

State	Source of Authority*	State	Source of Authority*
Alabama	c	Montana	c
Alaska	c	Nebraska	
Arizona	c	Nevada	i
Arkansas	s	New Hampshire	
California		New Jersey	c
Colorado	c	New Mexico	i
Connecticut	i	New York	c·s
Delaware	c	North Carolina	s
Florida	c	North Dakota	c
Georgia		Ohio	c
Hawaii	c	Oklahoma	s
Idaho	i	Oregon	
Illinois	i·s	Pennsylvania	c
Indiana	i·s	Rhode Island	s
Iowa	s	South Carolina	
Kansas	s	South Dakota	
Kentucky	c	Tennessee	s
Louisiana		Texas	c
Maine	s	Utah	s
Maryland	c	Vermont	c
Massachusetts	s	Virginia	c·s
Michigan	c	Washington	s·i
Minnesota	s	West Virginia	c
Mississippi	s	Wisconsin	s
Missouri	c	Wyoming	s

*Letters in this column indicate the existence of published rules and designate the basis of the court's power to promulgate them. Source key:

c = explicit constitutional authority
s = explicit statutory authority
i = authority based on inherent power of the court as an independent branch of government

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November 24, 1980

TO : House Criminal Justice Subcommittee
Attention: Mr. David Beier

FROM : American Law Division

SUBJECT : Promulgation of Rules of Criminal Procedure by the United States Supreme Court

Title 18 United States Code §§3771, 3772, entitled, respectively, "Procedure to and including verdict," and "Procedure after verdict," authorize the Supreme Court of the United States to promulgate rules of criminal procedure for use in divers United States courts. Section 3771 provides, inter alia, that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Similarly, section 3772 provides: "The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force."

Concern has been expressed that use of the 3772 provision or similar in section 3771 could be constitutionally suspect, i.e. allowing the Supreme Court to make rules changes to procedures to and including verdict applicable to pending proceedings. Thus, the question is presented as whether any statements relative to the constitutional effect of retroactive applicability of rules promulgated under section 3772 have been made. Additionally presented was the question of whether any case law could be found relative to the retroactive application of rules promulgated under section 3771.

Legislation Authorizing the Supreme Court to Promulgate the Rules

The Supreme Court was authorized to prescribe procedures after verdict by Act of February 24, 1933, Public Law 72-371, 47 Stat. 904. Introduced as Senate Bill 4020, 72nd Congress, the legislation was passed with no debate germane to the questions posed. 75 Congressional Record 11724 (Senate, June 1, 1932); 76 Congressional Record 4551 (House, February 20, 1933). The Judiciary Committee reports indicated that the purpose of the legislation was to simplify and make uniform the procedures in the lower courts so as to decrease delay in disposing of cases. Neither report discussed the question of retroactivity. Senate Re-72-627, House Report 72-2047. The section 3772 provision, quoted supra, is original language from Public Law 72-371.

Prior to promulgation of the rules authorized by the 1933 Act, an amendment was enacted, Act of March 8, 1934, Public Law 73-117, 48 Stat. 399, which retained the language quoted supra. Again the legislation, introduced as Senate Bill 2461, 73rd Congress, was passed with no debate germane to the questions herein posed. 78 Congressional Record 2014 (Senate, February 6, 1934); 78 Congressional Record 3734 (House, March 5, 1934). Again, neither Judiciary Committee report discussed the question of retroactivity of the rules so authorized. Senate Report 73-257; House Report 73-858.

Authority for the Supreme Court to prescribe rules of procedure to and including verdict, now section 3771, was granted by Act of June 29, 1940, Public Law 76-675, 54 Stat. 688. This authority was apparently given to help simplify criminal procedure by making it uniform. See: Homer Cummings (then

Attorney General), "Extending the Rule-Making Power to Federal Criminal Procedure," 22 Journal of the American Judicature Society 151 (December 1938). Introduced as House Bill 4587, 76th Congress, the legislation was passed with no debate 84 Congressional Record 8416 (House, June 17, 1940); 84 Congressional Record 8976 (Senate, June 22, 1940). The language relative to the effective date of such rules in the Act, substantially the same as the section 3771 language, supra, was not discussed in the Judiciary Committee reports. House Report 76-2492; Senate Report 76-1934.

Rule 59, Federal Rules of Criminal Procedure

It should be noted that this rule, unamended since its effective date, March 21, 1946, provides:

> These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

An early decision citing this rule and finding that the Rules were to have no retroactive effect is Norris v. United States, 190 F.2d 186 (5th Cir. 1951). Adoption of Rule of 38 in 1946 had the effect of causing a sentence of imprisonment to begin to run with an affirmative election of the person convicted who may be awaiting an appeal decision. Such was not previously the case. Norris argued that he should be given credit for incarceration prior to the effective date of the Rules but the court stated that the Rules were "not retroactive.

... although under Rule 59 they may be applied 'so far as just and practicable' to proceedings pending when the rules took effect." at 188.

Under the provisions of this Rule, examples abound of the Rules being applied to pending cases as far as just and practicable, e.g. United States v. Sheridan, 329 U.S. 379 (1946) [Supreme Court directing application of Rule 39(c) abolishing bill of exceptions on remand]; Singleton v. Botkin, 5 F.R.D. 173 (D.D.C. 1946) [Rule 40 Removal to another district applied to case pending when Rules became effective]; Bujese v. United States, 404 F.2d 615 (2nd Cir. 1968) [District court to determine whether to apply 1966 amendment to Rule 38(a) in a pending case.].

Retroactive Effect of Rules Promulgated Under 18 United States Code 3771

The following decisions have been found relative to the retroactive effect of the Rules, and subsequent amendments thereto, up to and including the verdict, Rules 1 through 31:

Rule 1. Scope [of the Rules]

Not Retroactive. Norris, supra.

Ruel 11. Pleas.

No retroactive effect. Christopher v. United States, 541 F.2d 507 (5th Cir. 1976); Goodwin v. United States, 544 F.2d 826 (5th Cir. 1977); Biogiorno, v. United States, 424 F.2d 433 (10th Cir. 1970); Alfano v. United States, 326 F. Supp. 792 (D. Conn. 1971).

Rule 16. Discovery and Inspection

No mandatory retroactivity. United States v. Jones, 374 F.2d 414 (2nd Cir. 1967).

Trial subsequent to effective date of rule change so amended rules to be used in discovery though not yet effective. United States v. Pastor, 419 F. Supp. 1318 (S.D.N.Y. 1975).

Earlier motion denied but motion under new rule prior to trial to be allowed. United States v. Gleason, 259 F. Supp. 282 (S.D.N.Y. 1966).

Rule 18. Place of Prosecution and Trial

Though offense committed prior to rule change, place of trial according to new rule. Dupointe v. United States, 388 F.2d 39 (5th Cir. 1967).

Rule 21. Transfer From the District for Trial.

Changed rule may be applied to pending trial. United States v. Jones, 43 F.R.D. 511 (D.D.C. 1967).

Rule 29. Motion for Judgment of Acquittal.

New rules applicable on appeal. Karn v. United States, 158 F.2d 568 (9th Cir. 1946), overruled on other grounds by Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964); United States v. Bozza, 155 F.2d 592 (3rd Cir. 1946) rev. in part, 330 U.S. 160 (1947).

Supreme Court Orders Promulgating Rules Under 28 United States Code 3772

Orders of the Supreme Court of the United States adopting and subsequently amending the Rules of Criminal Procedure after verdict were issued on the following dates: December 26, 1944, February 8, 1946, December 27, 1948 [two], April 12, 1954, April 9, 1956, February 28, 1966, December 4, 1967, March 1, 1971, April 24, 1972, April 22, 1974, April 26, 1976, April 30, 1979.

Generally, the order states that the rule amendments and additions are to take effect upon a date certain and are to "govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending." No comments were found relative to retroactivity of the promulgated rules.

Promulgation of the Federal Rules of Evidence

By Order of November 20, 1972, the Supreme Court provided, in pertinent part:

> 2. That the aforementioned Federal Rules of Evidence shall take effect on July 1, 1973, and shall be applicable to actions and proceedings brought thereafter and also to further procedure in actions and proceedings then pending, except to the extent that in the opinion of the court their application in a particular action or proceedings then pending would not be feasible or would work injustice in which event the former procedure applies.

A similar statement was included in the Order of April 30, 1979 relative to amendments to the Rules.

The enacting clause of the Federal Rules of Evidence, Act of January 2, 1975, Public Law 93-595, 88 Stat. 1926, provides, in pertinent part:

> ...That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidenciary principles apply.

Neither the House nor the Senate appear to have commented on the retroactive application of the rules in the reports accompanying the legislation, H.R. 5463, 93rd Congress. House Report 93-650; Senate Report 93-1277; House Report 93-1597 [Conference Report].

An amendment to the rules made by Act of October 28, 1978, Public Law 95-540, 92 Stat. 2047, included the following language:

> The amendments made by this Act shall apply to trials which begin more than thirty days after the date of the enactment to this Act.

Judge Weinstein, noting that "the usual escape clause" was to be found in the Act of January 2, 1975, has found that Rule 501, "General Rule [Privileges] has no retroactive effect. The question involved an attorney-client privilege in grand jury proceedings which took place in June 1975 prior to the July 1, 1975 effective date of the Act. It was opined that the "United States Attorney who was conducting the grand jury proceedings should obviously not be charged with any failure with respect to a rule subsequently adopted." United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975) at 857.

Conclusion

Congress does not appear to have directly addressed the question of retroactive application of the criminal procedure or evidence rules in either the rules enabling acts or legislation enacting specific rules.

Generally the courts have complied with the intent of the "usual escape clause" relative to discretionary application of the current rules if feasible and no injustice is worked on the parties.

Paul L. Morgan
Legislative Attorney

Appearance Before the Subcommittee on Courts and Constitutional Liberties of the House Judiciary Committee November 9, 1983
The Subject: Proposed Revisions in the Rules Enabling Act.

My name is Frank Remington. I am a member of the law faculty at the University of Wisconsin, Madison. My initial contact with rule making for the federal courts came in 1960 when I was asked by then Chief Justice Earl Warren to be a member of the Advisory Committee on the Rules of Criminal Procedure. I served as a member of that committee for a number of years and then was asked to succeed Professor Edward Barrett as the Reporter for the Criminal Rules Committee. After serving for a number of years in that capacity I was asked, by Chief Justice Warren Burger to become a member of the Standing Committee on Rules of Practice and Procedure. I served on that committee until my term ended this past August.

I should add that most of my experience over the 20 year period was with the rules of criminal procedure which I dealt with as a member of the Advisory Committee and as Reporter. My greater knowledge of the criminal rules also reflects the fact that I teach in the criminal law field and such experience as I have with the federal rules is through our Legal Assistance Program at the Federal Correctional Institution at Oxford, Wisconsin. This experience brings us into frequent contact with issues such as those dealt with in rule 11 on pleas of guilty;

rule 32 on the presentence report and sentencing and the rules governing 28 U.S.C. 2255 post conviction proceedings.

I recite this history to disclose the basis for my reactions to the federal rule making process generally and more specifically for my reactions to the charges proposed in the Rules Enabling Acts (H.R. 4144).

At the outset I should make clear my view that the federal rule making process has worked very well. Indeed I know of no current process for rule making, legislative or judicial, that has produced as high quality a product as has the federal rule making process. It is viewed as the "model" throughout the country. Not only is the product of federal rule making of high quality but it is also of very low cost. This is a result of the fact that committee members serve without compensation and the reporters have over the years worked for a very modest per diem. This is possible because those involved are convinced of the worthwhileness of the process; its quality has brought to it a status that makes all who are asked very willing to serve.

In considering changes I believe it important to be sure that the quality of the process is not lessened and I would think it in the interest of the Congress not to make changes which would make service on the various committees or as Reporter so onerous that capable people will be no longer willing to serve and devote the

great amount of time which is now devoted to rule making at little cost to the government.

Despite the very high quality of the rules which have been produced over the course of the past 20 years and despite the fact that this has resulted largely from donated time by a wide variety of capable people, there is an apparent growing dissatisfaction with some aspects of the rule making process. This is reflected in a growing Congressional involvement in the process and by an increasing number of suggestions for change in the process ranging from the removal of the Supreme Court from the process--to the making of changes which would open the process to public view.

During my tenure in rule making I personally welcomed Congressional interest, as I do this ~~oversight~~ hearing. I welcomed also the increased attention to rule making by organizations such as the American Bar Association and by an increasing number of scholarly articles critically examining the rule making process. I welcomed the increased attention because I believe that an informed Congress and an informed legal profession will agree that the rule making process has worked well and should be retained. I welcomed the increased attention also because, despite my high regard for the current process, I do believe that there are weaknesses in the process which can and should be dealt with as soon as possible.

Basically the problem is that the process is not well enough known and is viewed by some as not open to input from those outside the process. This results largely from several things:

(1) It is not known what is being considered as agenda items by the various Advisory Committees and it is not known whether it is possible to make suggestions as to agenda items.

(2) When rule proposals are circulated for the reactions of the bench and bar and reactions are forwarded to the Standing Committee, it is usually not known whether the suggestions were accepted or rejected and, if rejected, why they were rejected. In my view this is the primary reason why various people later urge the Congress to delay the effective date of the rule changes so that Committee hearings can be held for the purpose of allowing persons who have views to be heard.

(3) After the Advisory Committee sends proposals forward to the Standing Committee it is not known whether suggestions for change can be made to the Standing Committee. In large part this results from uncertainty as to the role of the Standing Committee and from lack of knowledge as to when proposals are forwarded to the Standing Committee for its approval.

(4) Finally when proposals have been sent forward by the Standing Committee the process has largely been invisible until the rule proposals emerge in printed form in a transmission of the rules by the Chief Justice to the Congress.

In the past couple of years, under the chairmanship of Judge Giguoux there has been changes made which do, to some extent, deal with those issues. For example there is now a "Gap. report" sent to the Standing Committee which details the reactions received by the Advisory Committee and states the reaction of the Advisory Committee to the suggestions it received.

At least in part the problem lies, in my opinion, with uncertainty as to the role of the Standing Committee. In H.R. 4144 the function of the committee is defined as:

> "...shall review each recommendation of each of the committees so listed for consistency with each other and existing rules and recommend to the judicial conference such changes as may be necessary to maintain consistency and otherwise promote the interest of justice." (H.R. 4144 Sec. 2073(b)(2))

In his testimony before this Committee Judge Giguoux said:

> "As far as the Standing Committee is concerned, our function is not a drafting one; we make technical and conforming changes to be sure the proposals are consistent with what other committees have been doing. If there is any substantive problem presented by a rule, it is returned to the advisory committee for further study and comment.

I question whether there is anything the Standing Committee does which would be of any public interest. I might add, Mr. Chairman, having sat through these meetings, that we may be doing a kindness to the public and the press if we do not subject them to the chore of having to do so."

I believe that the apparently limited function of the Standing Committee should be re-thought for at least two reasons:

(1) My recollection of the early days of rule making is that the Standing Committee played a much more prominent role in the rule making process. In part this undoubtedly reflected the fact that the chairman, Judge Albert Maris had been with rule making from 1960 when the rule making process was reactivated. In the early days each rule was discussed in detail, changes were made when thought desirable and a return to the Advisory Committee was decided upon only when the change was significant enough to require re-circulation for the reactions of the bench and bar.

(2) The question of understanding of the rule making process relates directly to whether there is some single institution to which one can turn as a means of effectively communicating with those involved in the rule making process. That single institution must, in my view, be the Standing Committee. I do not think it realistic to believe this can be done by the

Judicial Conference or by the Supreme Court and the various Advisory Committees are specialists not involved in the achievement of the general, overall objectives of rule making.

To illustrate what I have in mind I would propose the following amendment to HR 4144:

"(2) In addition to the committees listed in paragraph (1) of this subsection, there shall be appointed under Subsection (a) of this section a standing committee on rules of practice and procedure The standing committee shall have the following responsibilities:

(i) To insure that important procedural issues are given attention by the appropriate advisory committee.

(ii) To circulate proposed agenda for Advisory Committee meetings and to receive and forward to the appropriate Advisory Committee suggestions for additional agenda items and any suggestions as to what the committee should decide with respect to an agenda item.

(iii) To insure that recommended changes in the rules are limited to changes in procedure and do not include substantive changes. In the achievement of this objective the Standing Committee shall

adopt appropriate written policies to guide individual advisory committees with respect to the proper scope of rule making and shall share such policies with the bench, the bar and other interested persons.

(iv) To insure that proposed changes are circulated in ways which enable members of the bench, the bar and other interested persons to express views as to the desirability of proposed changes and to schedule public hearings on a proposed rule change when the importance of the change warrants a public hearing.

(v) To insure that persons who comment on proposed changes are informed as to the response to the comment and the reasons therefore.

(vi) To adopt procedures to make known what proposed rule changes have been approved by the Standing Committee and their status of the proposed change at any time prior to the proposal being approved by the Supreme Court.

(vii) To create new Advisory Committees as the need arises to deal with procedural questions which fall outside the expertise of existing Advisory Committees.

(viii) To recommend to Congress, if the need arises, changes in the function of the Standing Committee which will better achieve the objective of an effective rule making process.

Finally there is authorized a reporter and such additional resources as necessary to enable the Standing Committee to achieve these objectives."

The purpose of the suggested re-draft is to stress the need for a more active role for the Standing Committee. When proposed rules are circulated for comment the circulation goes out over the signature of the chairman of the Standing Committee. I have long believed that respondents believe they are communicating with the Standing Committee and that the views expressed will be considered by the Standing Committee as well as by the Advisory Committee in the decision as to whether to forward the proposed rule change to the Judicial Conference. Part of the frustration I have sensed on the part of respondents is a result of the fact that it is too often unclear as to whom the suggestions were directed and unclear as to what was done with the suggestions. I believe that confidence in the rule making process requires that those who take the time to write and to make suggestions receive a reply, not merely that the suggestion has been received, but that it was considered and accepted or rejected and if rejected the reasons why.

I believe this kind of communication under the direction of the Standing Committee will increase understanding of and support for the rule making process. Enabling interested persons to know what is on the agenda of the various advisory committees and to be able to suggest additional agenda items; to react to proposed changes and to have informative responses to any suggestions which are made; and to know the status of proposed rule changes is the kind of "openness" which I believe will respond adequately to those who are concerned about the present process. Open meetings will not serve the interests of most people who are geographically distant from the place of the Advisory Committee meeting. And open meetings, unless made into "town meetings" will not serve the objective of effective communication between those involved in rule making and those who desire to have a significant involvement in the decision as to whether to approve a proposal for a rule change.

December 13, 1983

Comments of Public Citizen Litigation Group
on H.R. 4144, The Rules Enabling Act of 1983

On behalf of the Public Citizen Litigation Group, we are pleased to submit the following comments regarding H.R. 4144, the Rules Enabling Act of 1983. In general, we support both the basic thrust of the bill and most of its provisions. We do, however, wish to offer a few suggestions for improvements and clarifications. Unless otherwise indicated, the sections referred to below are the provisions of Title 28 as they would be amended by H.R. 4144.

Section 2072

We agree that the Supreme Court should no longer be responsible for the promulgation of rules of practice and procedure. In our previous testimony, we stated a preference for further delegation to the Standing Committee on Rules of Practice and Procedure, largely because we believe that the Judicial Conference of the United States is already overcommitted and that its members will not have an adequate opportunity to give the matters the careful study that they require. In addition, because of the presence of the Chief Justice, as well as the chief judges of each circuit on the Judicial Conference, additional problems will inevitably be created when a question concerning the interpretation of the rules or the scope of the Judicial Conference's authority under the Rules Enabling Act arises.

Nonetheless, we support the delegation to the Judicial Conference as a significant improvement over the current practice. In this regard, we believe that there should be a complete break of authority from the Supreme Court, and that the power given by the statute should not be that of allowing the Court to delegate to the Judicial Conference, but should remove the Court entirely from the process. While we recognize the importance of the prestige of the Supreme Court, we believe that the Judicial Conference also commands substantial respect in the legal community. Moreover, at present the various committees are not promulgating entire new rules, but are improving upon the rules already in place.

Section 2073(a)

Subsection (a)(1) of Section 2073, H.R. 4144, would require a "balanced cross-section of bench and bar . . ." on all rules committees. We applaud that change and do not believe that this provision is simply a restatement of the current practice. As our prior testimony indicated, we believe that there are serious deficiencies in the current practice, principally the exclusion of members of the bar who represent plaintiffs in personal injury cases, civil rights cases, and other forms of public interest litigation. In our view, these lawyers have a very different perspective on the litigation process than do the members of the bar who typically represent large corporations, which are generally defendants, and who now constitute the bar members of the

advisory committees. In this connection, we believe it would be useful for the Committee report to reflect the kind of diversity which this Committee sees as essential, which should not be simply the current division among judges, lawyers, and law professors which the Judicial Conference apparently now believes constitutes adequate representation. We also believe that the greater inclusion of women and minorities is important. None of these changes need to cause these committees to become unwieldy. They do require a recognition that representatives from a variety of different practices is absolutely essential if there is to be meaningful diversity.

We also support specific time limits on the terms of committee members, as set forth in subsections (a)(1) and (a)(2). If anything, we would support shorter terms, largely because we believe that an infusion of new members is generally useful. We recognize that there may be extraordinary circumstances, such as the preparation of entirely new Bankruptcy Rules or Rules of Evidence, when it might be desirable to continue certain members on beyond their ordinary terms. We believe, however, that if true emergencies arise, Congress will promptly respond and see that an extension is granted. In any event, there is nothing to preclude persons who are no longer members of a committee from continuing to work closely with the committee, albeit without a vote. One point needs clarification: the Congress should make clear whether service on a committee prior to the effective date of these amendments is included in the total of ten years provided by subsection (a)(2).

Section 2073(c)

We also strongly support the provisions of subsection (c), regarding open meetings. In our view, these advisory committees are functionally the same as any other federal advisory committee, except that they are being convened as an arm of the Judicial, rather than the Executive branch. There is no reason to believe that opening federal advisory committee meetings, or the meetings of federal agencies pursuant to the Government In The Sunshine Act, or for that matter Congressional committees, has produced the kind of inhibition of candid discussions which the Judicial Conference fears. The committees would not, after all, be dealing with specific cases or with personnel matters which would justify executive session. In our view, there is very little basis to believe that any meetings should be closed, let alone that the committees should continue their present practice of closing every portion of every meeting.

In that regard, we believe that the bill should also include specific standards under which meetings can be closed. We would also recommend that the desire to have a candid exchange of views be specifically excluded as a basis for closing a meeting. While there may be some people who will be less candid in some meetings, Congress should frankly recognize that this small cost in a few cases is a price worth paying for an overall policy of openness on such important matters.

With regard to the requirements for a transcript, we assume that that can be satisfied by a tape recording, rather than having the additional expense of stenographic minutes, since in many cases there would be no reason to incur the additional cost. We also would urge that the bill be amended to require that there be detailed minutes of closed meetings, which in turn shall be made public, with sensitive matters deleted. Indeed, there is at least a strong, if not a stronger, case for that requirement when meetings are closed than when they are open.

While there is some uncertainty because of the internal structure of section 2073, as we understand it, the five specifically designated advisory committees, as well as the standing committee, would have their meetings open, but that the portions of Judicial Conference meetings dealing with the approval of any recommendation on rules changes would remain closed to the public. In our view, there is no reason for the Judicial Conference to maintain its longstanding policy of closing all of its meetings. However, we do not believe that this is an appropriate time to open that broad issue, and therefore, as long as it is clear that both the advisory committees and the standing committee must have open meetings, we do not now ask the Congress to include the Judicial Conference in that requirement.

There is one point made by Judge Gignoux in his testimony (p. 7) with which we are in full agreement, and which requires an amendment to H.R. 4144. The procedural requirements as to

terms of membership, opening and closing meetings, balanced representation, etc. should not be subject to judicial review, particularly in a lawsuit which challenges the validity of a rule that has been promulgated as simply one issue in the case. In this regard, H.R. 4144 would be different from the Federal Advisory Committee and Government In The Sunshine Acts, which provide for judicial review. However, we see no reason to believe that these committees will not comply with the law, even if there is no judicial review. Moreover, we are concerned that any possible noncompliance, which would most likely be inadvertent, would create serious problems of disruption if it were made a basis for litigation. On the other hand, if it turns out that there is significant noncompliance, particularly with the openness requirement, Congress can always change the law to make it judicially enforceable.

Section 2073(d)

While containing a list of specific requirements, section 2073(d) does not include the requirement that the committees respond to public comments, which is set forth in paragraph 5(c) of the standing committee's June 17, 1983, procedures. Indeed, the bill as drafted fails to include a number of procedures which the standing committee has already adopted. Thus, it might be well to include, at least in the legislative history, a statement indicating that except insofar as the procedures of the standing committee are in conflict with H.R. 4144, it is anticipated by Congress that they will be continued.

Two other matters relating to the operation of these provisions seem worthy of inclusion. Congress should specifically provide for a paid reporter for each of the committees, including the standing committee. All of the committees now have them except the standing committee, and that committee, which will have, if anything, a greater function than it has under present law, should also have a reporter. Finally, there is no mention made of salary or per diem for the members who are not federal officials, and that matter, along with an authorization for the payment of travel and other expenses, ought also to be included.

Section 2074

We are in agreement that the time period should be uniform for all of the submissions to Congress, and we believe that the "report and wait" provisions of this section are fully consistent with the decision of the Supreme Court in INS v. Chadha, 103 S. Ct. 2674 (1983), which invalidated legislative vetoes, but not report and wait requirements.

We are concerned, however, that the March 15 reporting date may create problems because the Judicial Conference generally meets only in mid-March and mid-September. Thus, no matter when the conference acts, the March 15 date may cause serious additional delays, unintended by the committee. We also question whether it is necessary to have the nine months delay that the bill provides; a period of six months seems adequate. Finally, the way that the bill is now written, it makes rules effective on Decemer 15 and no other

date. The interest of the Congress should be only in seeing that rules are not effective before Congress has a reasonable period of time to review them. Therefore, there is no reason to set a specific effective date when, for instance, the Judicial Conference may prefer to have new rules effective as of the beginning of a new calendar year or some other appropriate date.

We have two other minor observations regarding section 2074. Subsection (a)(1) states that when a rule becomes effective, it shall supersede "any contrary provision of law then in effect . . .." That provision might be read to allow a rule to override a statute, and we do not believe that is its intention. This provision serves no other discernible function, but it does raise doubts, and therefore we suggest its elimination. Similarly, we have difficulty with subsection (a)(2), which deals with rules of the Supreme Court, and we believe that it too can be eliminated. So far as we understand the intent of subsection (2), it is to permit the Supreme Court to continue to issue its own rules, but nothing in any of the other provisions of H.R. 4144 would appear to be to the contrary. In any event, that provision requires modification, if not elimination, so that it will be clear that the Supreme Court will have authority to promulgate rules only with respect to cases pending before it.

Section 2071

Subsection (3) of the bill would add a sentence to section 2071. We take no position with respect to whether it is advisable for the Judicial Conference and the circuit judicial councils to undertake the steps which are outlined, although we are in accord with the general sentiments of that provision, which is that there is a proliferation of local rules, that they are often issued without adequate opportunity for public input, and that many of them are arguably in conflict with provisions of the federal rules. Our only observation is with respect to the reference to advisory committees created under section 333 of Title 28. We are unaware of any portion of that section which creates circuit council advisory committees, and thus believe that that provision ought to be clarified.

CONCLUSION

Subject to the matters enumerated above, we support H.R. 4144 and stand ready to provide the committee any assistance it may need in further refining the bill.

Alan B. Morrison
Director

Broadening participation in the courts through rule-making and administration

Though rule-making and court administrative offices were intended to facilitate judicial control, they have become vehicles through which 'the public' may participate in court operations.

by Russell R. Wheeler

One of the more perplexing problems in democratic government is determining the proper degree of public participation in the structure and process of the courts. Democratic government presumes public participation in the affairs of government, and it assumes the ultimate accountability of those who govern to the public in whom sovereignty rests.

The courts, though, are different from the other branches of government in several respects. Some of their basic purposes are anti-democratic, or at least anti-majoritarian; they are to offer the protection of the laws and due process to those who espouse unpopular causes and to minorities under attack from powerful groups. Moreover, the courts are not the kind of representative institution in which citizens can easily participate; the administration of justice often requires a special competence and professional legal skills from those charged with the task.

Much of this century's zeal for changing the courts has fed off the early court reformers' stress on professionalism and their indictment of "the popular interference with the administration of justice."[1] They traced this interference to the early nineteenth century, with its emphasis on electing judges for short terms and its presumption that, in a democracy, any citizen was able to perform the functions of government. As historian Richard Ellis notes, an objective of many in this period was a "system of administering justice . . . with only a minimum of contact with the legal profession."[2] This produced legislative dominance of procedural rulemaking, and a court organization tied closely to the local community and the elected clerk of court. The early twentieth century reformers' cure for this situation was to provide the courts with authority over their own administration, and judicial control of judicial administration is still a watchword.

Yet, even our first chief justice, John Jay, who hardly suffered from an excess of democratic spirit, approvingly quoted an unnamed but "celebrated writer" who said that "next to doing right, the great object in the adminstration of public justice should be to give public satisfaction."[3] A recurring question in American judicial history has been how to foster public satisfaction with the courts while protecting the judicial process. That question is coming even more forcefully to the forefront today.

Varied objectives

It oversimplifies, of course, to think of the public as a monolith. Numerous groups with varied objectives are interested in what courts do, and this leads them to want a say

1. Arthur Vanderbilt, *Impasses in Justice*, WASH. U. L. Q. 268, 270 (1956).

2. Richard E. Ellis, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 121. New York: Oxford University Press, 1971.

3. The quotation and a discussion of Jay's use of it are in Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUPREME CT. REV. 123, 154.

in how they perform. One example is bar association polls to evaluate judges who are standing for retention in office. Others are victim and witness aid programs and "court watching" by citizen groups with such varied objectives as improving the plight of defendants in misdemeanor courts, increasing the efficient use of tax dollars, or "weed[ing] out judges who are 'soft' on criminals."[4]

However, none of this substantially affects the courts' authority to administer themselves as they see fit. Judicial control of judicial administration rests largely on the power to make system-wide rules of procedure and the existence of administrative offices capable of undertaking court management tasks. Both are the result of this century's court reform efforts, and were basically designed to facilitate the control of court procedures and administration by the judges.[5]

Ironically, however, these may be the vehicles that allow persons with a wider variety of interests and perspectives to participate in court operations. During this century, the business of the courts has become more diverse, their impact has expanded into new areas, people have come to recognize the importance of what they do, and their need for administrative and managerial support has increased. Thus people other than judges and lawyers are closely involved with the courts and are seeking to participate in their management. The rule-making process and offices of judicial administration are providing them with a means to do so.

It may add a perspective to the current judicial scene to consider why and how this increased public participation in court rule making and administration is coming about. It will also be useful to consider what the future nature and course of this "opening up" process might be.

I. Rule-making

Most supreme courts issue jurisdiction-wide rules of civil, criminal and appellate procedure, and one survey four years ago found about half of them also issue rules in other areas such as judicial discipline and assignment of judges.[6] The stated purpose of rules is to insure consistency, simplicity and fairness throughout the jurisdiction in matters of procedure and operation. As we shall see, however, their impact is often much broader than one might expect from these rather neutral objectives.

Court rules are almost always the product of bench-bar drafting committees. The United States Supreme Court, for example, promulgates federal procedural rules developed by the Judicial Conference's several rules committees,[7] which are assisted by law school professors serving as reporters. Staff and additional research support may come from the Administrative Office of the U.S. Courts and the Federal Judicial Center. Proposed rules and rules changes are circulated within the legal profession for comment before they are passed on to the Conference. Once promulgated by the Supreme Court, however, they take effect absent congressional veto.

Judicial rule-making is considered an element of judicial independence and is the product of efforts throughout this century to reclaim procedural rule-making authority from legislatures. Pound and his colleagues summarized the objective in 1914: "giving

4. Paul Nejelski, *The Tension of Popular Participation*, 1 ST. CT. J. 32. (Fall 1977). For other treatments of increased public involvement in the courts, see Jack B. Weinstein and Diane L. Zimmerman, *Let the People Observe their Courts*, 61 JUDICATURE 156 (1977); and Paul Nejelski, *Judging in a Democracy: The Tension of Popular Participation*, id., at 166. Methological problems in bar evaluation polls are discussed in Steven Flanders, *Evaluating Judges: How Should the Bar Do It?* 61 JUDICATURE 304 (1978).

5. For a good case study, see Peter Fish, *Guarding the Judicial Ramparts: Judge John J. Parker and the Administration of Federal Justice*, 3 JUSTICE SYSTEM J. 105 (1977).

Judicial authority to prepare and administer the judicial budget is arguably a third instrument of court control of court administration, but this and several other management functions can be seen as subsumed within the general category of court management.

6. USES OF THE JUDICIAL RULE-MAKING POWER. Chicago: American Judicature Society, 1974. *See also* James Parness and Chris Korbakes, A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES. Chicago: American Judicature Society, 1973.

7. The Supreme Court's authority to promulgate rules derives from several rules enabling acts, codified in 28 U.S.C. 2072 (civil procedure) and 18 U.S.C. 3771 (criminal procedure). The Judicial Conference's participation is prescribed in 28 U.S.C. 331.

power to the courts to make rules and thus giving the courts power to do what we require of them."[8]

More specifically, court reformers have regarded as crucial that the development of procedural rules be under the control of judicial and legal professionals, rather than influenced by the broader set of interests presumably represented in the legislature. "Legislated procedure," bemoaned the American Judicature Society in 1917, "tends to restrict and belittle the courts . . . It makes courts dependent upon inexpertness in rule drafting."[9] Thus, in exercising the rule-making function, Vanderbilt wrote in 1949, "the courts should be aided by expert advice such as judicial conferences, judicial councils, and committees of the bar . . ."[10] Underlying this prescription may have been the view that Vanderbilt expressed several years later. He said then that "the remedies for [the courts'] procedural and administrative defects are relatively simple, . . . well known, and generally agreed upon by those who have taken pains to study the situation objectively."[11]

The increasing importance of rules

Even if Vanderbilt's view was once true, it surely is not now. In recent years there has been a growing concern that judicial rule-making now includes complex matters which are open to honest difference of opinion and which have great potential impact on litigants and general significance to the public. Consequently, it is believed that the process of making rules could be significantly improved were it not restricted to the relatively small component of bench and bar who have usually dominated the process. Thus, the concept of judicial rule-making, although well in place, may be developing into a much more representative process than those who established the current framework—state and federal—would have wanted or at least expected.

Perhaps the major impetus for re-examination of the rule-making process has been a realization that rules can have important consequences. Courts tend to look on them as a means to establish efficient procedures, but even matters appropriately defined as procedure often involve policy judgments with far reaching consequences. As Sir Henry Maine observed long ago, "substantive law has at first the look of being gradually secreted in the interstices of procedure."[12]

Rule-making's potential to affect more than mere housekeeping matters can be clearly seen in both criminal and civil procedure. Chief Justice Warren Burger, for example, recalled that as a circuit judge he suggested to Chief Justice Earl Warren that "[s]ome of the changes in criminal procedure resulting from opinions of the Court, would perhaps better have been left to the rule-making process," which he thought was a better tool for broad-gauge policy-making.[13] Although the *Miranda* Court majority had considered and rejected this suggestion,[14] Judge Jack B. Weinstein has raised the point again.[15] He characterizes as "forceful" the argument that "rule-making rather than *Miranda* should have dealt with in-custody interrogation," because rule-making is more flexible, able to bring a variety of points of view to bear on the subject, and facilitates planning by those who will be affected by the rule.

In the civil area, a special committee of the American Bar Association's Litigation Section, and the Judicial Conference's Civil Rules Advisory Committee, have both proposed tentative changes in the Federal Rules

8. Charles Eliot, et al, *Preliminary Report on Efficiency in the Administration of Justice*, in Russell Wheeler and Howard Whitcomb, JUDICIAL ADMINISTRATION: TEXT AND READINGS 47, 55. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1977.

9. *Procedure Through Rules of Court*, 1 J. AM. JUD. SOC'Y, 17 (June, 1917).

10. Arthur Vanderbilt, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 92. New York: National Conference of Judicial Councils, 1949.

11. Vanderbilt, *supra* n. 1, at 269.

12. Quoted in A. Leo Levin and Anthony Amsterdam, *Legislative Control over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PENN. L. REV. 19, note 83 (1956).

13. 421 U.S. xxvii-xxviii (1975).

14. Miranda v. Arizona, 384 U.S. 436 at 490 (1966).

15. Jack B. Weinstein, REFORM OF COURT RULE-MAKING PROCEDURES 102–103. Columbus, Ohio: Ohio State University Press, 1977

of Civil Procedure to narrow the scope of pretrial discovery and facilitate early judicial control of the process.

The proposals reflect a view that the rules encourage discovery that is "sweeping and abusive," prolonged and overly expensive.[16] There is, to be sure, other evidence that the current rules are a quite adequate judicial tool to control discovery, at least in the great majority of cases.[17] But, regardless of whether or not the current rules are adequate, it is clear that court-made rules can encourage or help control the heavy cost of civil litigation, costs that are in many cases ultimately paid for by the public, and that the impact extends far beyond the resolution of individual cases.

Similarly, the changes in class action litigation associated with the 1966 amendments to the Federal Rules of Civil Procedure, and with counterpart rules in the states, have been criticized for encouraging massive class litigation—lawyers' battles that class members observe passively, at best, because they have little stake in the outcome. On the other hand, Supreme Court decisions have been criticized by others for limiting the access to the judicial forum provided by the rule,[18] and undercutting the availability of the class action as a consumers' weapon.

16. "Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, American Bar Association" (1977) at 3.

The Judicial Conference Committee's tentative proposals may be found in 77 F.R.D. 613 (1978). Subsequent to Judge Thomsen's open letter to bench and bar circulating the proposals (letter of March 31, 1978, 77 F.R.D. 616), the Committee elected to postpone final consideration of the changes and to hold public hearings on them.

17. *See* Paul Connolly, Edith Holleman and Michael Kuhlman, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY. Washington, D.C. Federal Judicial Center 1978; and Steven Flanders et al, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS. Washington, D.C.: Federal Judicial Center, 1977.

18. The chief objects of complaint are, of course, Zahn v. International Paper Co., 414 U.S. 291 (1973), requiring that each member of the class in a Rule 23 (b) (3) suit meet the required $10,000 jurisdictional amount if brought under diversity of citizenship jurisdiction; and Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974), requiring the plaintiff to notify each potential member of the class whose name and address is readily ascertainable—in *Eisen*, over 2,000,000 potential notifications.

The matter is the subject of a Justice Department proposal to amend the rule legislatively as a part of a substantive, economic solution to the problems of mass economic injury.[19] But, the merits of the debate over class action rules[20] is not the basic point here. Rather, the point is the growing recognition of the potential consequences of court rules and thus of changes in them.

Understandably, as rule-making's scope has increased, the various interests affected by those rules have sought a voice in the process by which they are made. Representing some of those interests in the federal rule-making process has been the Congress of the United States.[21]

Growing public interest

When the Supreme Court promulgated new Federal Rules of Evidence in 1972, Congress questioned whether the proposals were "simply procedural," since they involved both the definition of evidentiary privileges and the allocation of burdens of proof. The rules were subsequently rejected in favor of legislation embodying some of the proposals of the Judicial Conference and the Supreme Court. More recently, Congress imposed independent judgment on proposed and amended Rules of Criminal Procedure which involved changes in pre-trial discovery and negotiated pleas.

The legislative history of the Speedy Trial Act of 1974 showed similar differences in institutional prerogatives. To Senator Ervin, "[t]he Court was legislating when it issued Rule 50(b) [the Speedy Trial Rule of the Federal Rules of Criminal Procedure] and acting beyond its power under the Rules

19. S. 3475, 95th Cong., 2d. Sess. (1978). For a discussion, *see Hearings ahead for class-action reform*, 64 A.B.A.J. 1490 (October, 1978).

20. Professor Miller has asserted that current federal class action litigation has been totally unaffected, either by the 1966 amendments, or even by the 1938 Federal Rules of Civil Procedure or the Equity Rules that preceeded them. Arthur R. Miller, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE. Washington, D.C.: Federal Judicial Center, 1977.

21. For an analysis of the resort to Congress, *see* Charles Alan Wright, Book Review, 9 ST. MARY'S L.J. 652, 653 (1978).

Enabling Act."[22] But the director of the Administrative Office of the U.S. Courts stood by the Judicial Conference's view "that the problem of speedy trial is one that can and should be handled through the rules of judicial procedure and good overall judicial administration."[23]

Recognition of the potential effect of rules has spurred interest by other groups previously unaware of, or uninterested in, the rule-making process. For example, as Professor Wright has noted, the press's interest in the "dreary work of procedural reform" was sparked by provisions in the proposed federal Rules of Evidence that ran counter to the concept of journalists' testimonial privilege.[24]

More recently, a report of the Legal Services Corporation's Research Institute on Legal Assistance advised its readers that the "Judicial Conference and especially its committees are the source of the future agenda for rules of procedure, administrative changes to deal with crowded dockets, and political initiatives to contract or expand access." The report also advised that a Legal Service's staff attorney would

> attempt to educate the Legal Services community on how this system works. In addition, he will analyze the possibilities for Legal Services people to affect decision-making either directly, by participating in relevant current conferences or serving on advisory committees, or indirectly, by advocating client positions before the judicial system.[25]

This emerging recognition of a rule-making process whose major components have been in place for 40 years may thus portend significant efforts to gain access to it on the part of numerous interests. Moreover, such access might be sought not merely on highly consequential rules of recent vintage, but on numerous other rules in areas that traditionally have been accepted as the courts' privilege to control. As was asked 20 years ago, should judges have exclusive say through rules about whether trial courts are open in the evenings?[26]

Modifying the process

The recognized effect of procedural rules on the way in which courts decide cases, and thus allocate resources in society, has led to numerous proposals to modify the manner in which the rules are made. Several bills are pending in Congress,[27] the state and federal courts are re-examining their rule-making processes, and a critical body of literature has developed. Two objectives underlie this ferment: one is basically empirical, i.e., to learn how the rules work so that the process can respond promptly to new developments, and so that the impact of proposed changes on the system's workload can be measured. The second objective is to encourage broader participation in the process, and expose it to public view.

This second objective reflects the realization that rule-making is a legislative process. Legislative, as used here, does not imply that rule-making necessarily belongs in the legislature. It means instead that rule-making, by its nature, is a process of developing general rules for application to a variety of specific situations. A legislative process, at least in the ideal, is characterized by broad participation by affected interests. Most of the proposals to revise current judicial rule-making argue for broader participation in the process, starting with members of the bar and the legislature.

The goal of broader participation also is behind the proposal to require rule-making bodies to describe their procedures publicly. Proposed federal legislation would require the Judicial Conference to publish descriptions of its rule-making procedures in the Federal Register.[28] North Dakota's newly adopted "rule on rules" is published in a

22. *Hearings before the Subcommittee on Crime of the House Judiciary Committee on the Speedy Trial Act of 1974*, 93rd Cong., 2d. sess., at 160 (1974).

23. *Id.*, at 178. One federal judge has expressed agreement in a case. Judge Young held that imposing time limits by legislation strikes at the heart of judicial power. U.S. v. Howard, Criminal Number Y-77-387 (D. Maryland, 7 Nov. 1977) at 5.

24. Wright, *supra* n. 21, at 655.

25. Legal Services Corporation, Research Institute on Legal Assistance, CLEARINGHOUSE REVIEW 861, 862. Washington, D.C., February 1978.

26. Levin and Amsterdam, *supra* n. 12, at 35.

27. H.R. 3413, 95th Cong., 1st sess (1977); H.R. 7461, 95th Cong., 1st sess (1977).

28. *E.g.*, H.R. 7461, 95th Cong., 1st sess., §§2074(d) (1977).

12-page pamphlet that describes and diagrams the formal process.

It is important, in trying to make judicial rule-making more legislative, to seek the best in the legislative process. One of the more obvious—but not necessarily the best—characteristics of rule-making in the legislatures is the heavy influence exercised by those interests intimately tied to the policy arena and to legislators. Judicial rule-making may be able to overcome this characteristic. Judges, in part because their tenure is relatively secure, may be able to structure, within the judiciary, a legislative process for rule-making that will inform them of *all* legitimate differences of opinion about proposed rules so that no single interest will be dominant.

This is not to deny Professor Geoffrey Hazard's plea "that professional elites [viz., experts in legal procedure, should] . . .retain a legitimate place in policy making."[29] It simply is to suggest that the legitimacy of the rules would not be jeopardized were the process informed by the technical expertise of bench and bar members, as well as lawyer and nonlawyers groups who could provide rule-making committees with their particular understanding of the justice arena and how proposed rules might affect it.

Seeking a broader base

The goal of a broader base is not necessarily inconsistent with the objectives of some of those who developed the current processes, an objective that Judge Biggs said in 1956 was "to make the base as broad as possible." The means to this objective, in his view, was to include trial and appellate "judges . . . on these [advisory] committees, members of the bar, and law school professors on a wide geographic basis, [intending] that most of these persons would be the people in the field who deal with the rules everyday."[30]

However, definitions of what constitutes as broad a base as possible have been expanding in all areas of American life since the 1950s. In particular, there has been tremendous growth in the courts' subject matter and thus in the groups with an interest in the courts' procedural rules. (Indeed, for similar reasons, there have been recent efforts to broaden participation in federal agency rule-making and to introduce greater planning into the agency rule-making process.)[31]

The legislature has been seen as a primary way to channel diverse views into the rule-making process—both when the legislature reviews the rules as a body and when legislators serve on rules committees. The American Bar Association's Court Organization Standards, for example, urge that judicial rule-making be vested either in the Supreme Court or in a rule-making committee. In either case, in the words of the commentary, the courts should provide a forum, not only for the bar but also for the legislature, "as the properly elected representatives of the community."[32]

In this vein, when the House Criminal Justice Subcommittee was considering the proposed amendments to the Criminal Procedure Rules, the chairman of the Judicial Conference's Standing Committee on Rules of Practice and Procedure said there was a need for closer consultation with Congress

29. Geoffrey Hazard, Book Review, 87 YALE L. J. 1284, 1294 (1978).

30. *The Rulemaking Function and the Judicial Conference of the U.S.*, 21 F.R.D. 117, 124 (1957).

31. *See, e.g.*, "Guide to Development in Evaluation of Agency Reports under Executive Order 12044 on Improving Government Regulations," 43 Fed. Reg. 36412 (Aug. 16, 1978). See also H.R. 1422, 95th Cong. 2d sess. (1978).

32. American Bar Association Commission on Standards of Judicial Administration, STANDARDS RELATING TO COURT ORGANIZATION 73. Chicago: ABA, 1974.

It is worth observing how the debate over the legislature's role has changed. The commentary in the ABA Standards cautions that courts should have a due regard for legislative concern "about matters of general public interest, even as to matters that might technically be deemed 'procedural'." This reflects the current convention that the legislature's primary legitimate concern is rule-making that involves substantive rather than procedural questions.

The early reformers, however, proposed a "system . . . of regulating *only* the details of practice by stated rules of court, leaving the important matters of procedure to be enacted by the legislature. . . ." *Procedure by Rules of Court*, 1 J. Am. Jud. Soc'y 77, 79 (1917). (Emphasis in original) The same point is made in another early article's call "for restoring to the courts their traditional function of controlling and developing at least the less essential parts of procedure;" *supra* n. 9. Of course, these statements of modest objectives may reflect tactics as well as substance.

and perhaps for having members of Congress serve on the rules committees, as Justice Department representatives do now.[33] Others, however, such as Judge Weinstein, while supporting the basic concept of Congressional review of substantive principles in the rules, have cautioned against Congressional representation on the committees, in order to avoid giving "disproportionate influence in rule-making," especially to senior Congressional members.

Seeking all viewpoints

Judge Weinstein wisely recognizes that the notion that Congress provides "a direct link to the people" is, as he gently puts it, perhaps "only a theoretical consideration."[34] The best way to achieve access to the process by those who are or might be affected directly by the rules is through the participation of the groups themselves. This idea is reflected, for example, in a recent press release in which the California Chief Justice's Advisory Committee for an Effective Publication Rule invited oral or written comment on the current relevant rules by "members of the public, lawyers, judges, publishers and other interested groups and businesses."[35]

Giving a hearing to anyone who wants it is not the same as structuring a process that truly informs decision makers.

Of course, seeking comment on proposed rules within the legal community and outside it is an empty gesture unless the purpose is truly to inform those who make rules. Moreover, there is a subtle but important distinction that must be observed: giving a hearing to anyone who wants or demands it is not necessarily the same as structuring a process that will indeed inform the decision makers. This point is nicely captured in North Dakota Chief Justice Ralph Erickstad's observation that the requirement for broad notice of proposed rules contained in his Supreme Court's new rule on rules "is a comfort to the court and a proper protection for the public and court constituencies."[36] Achieving this goal—a rule-making process that assures the rule makers they have been well-informed about the proposed rules—would suggest a vigorous effort to gain information through

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33. *Hearings on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93rd Cong., 2d Sess., ser. 61 at 207 (1974).

In 1977, the Chief Justice appointed former Congressman Hungate (who served as Chairman of the Criminal Justice Subcommittee when it considered the Rules of Criminal Procedure) to the Criminal Rules Advisory Committee of the Judicial Conference. This would lend support to Baar's thesis that the federal courts, fearing a weakening of their "legal expertise strategy," are turning to a partnership strategy with Congress in order to retain control over the rule-making process. *See* Carl Baar, *Federal Judicial Administration: Political Strategies and Organizational Change*, in Wheeler and Whitcomb, *supra* n. 8, at 103.

34. Weinstein, *supra* n. 15, at 148.

35. Administrative Office of the Courts News Release No. 63, October 3, 1978.

Proposed legislation would require the Judicial Conference to seek comment "from a wide variety of persons and organizations that may be affected by the adoption of the proposal." H.R. 7461, 95th Cong. 1st sess. §§2074 (c) (1977). Interestingly, though, Representative Holtzman's bill would require notice and copy only to "organizations representing those segments of the legal community that are concerned or have in the past indicated a concern with matters the proposal affects."

Among the current rule-making literature, Professor Lesnick's article represents an early call for broadened professional and public participation; see Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A.J. 579 (1975).

On a related note, the Nevada Supreme Court recently declared unconstitutional, as applied to judicial bodies, a state "sunshine law" on which a petitioner had relied to gain access to a meeting at which a trial court was to consider proposed rules involving trial jurors' selection and duties (Goldberg v. Eighth Judicial District Court, 572 P.2d 521, 1977). A concurring justice argued that since local rules may not take effect until 60 days after publication and tentative approval by the Supreme Court, "lawyers and the public [thus have] an opportunity to provide input and to offer objections . . ." (*id.*, at 524, Gunderson, J.).

36. Ralph Erickstad, "A New Rule-Making Process for North Dakota," speech to Judicial Rule-Making Workshop, National Judicial College, Reno, Nevada, at 12 (1978).

hearings as well as a preliminary effort to learn what groups might have such an interest.

For some matters—especially on the local level[37]—it is hard to see what interest nonlawyers would have in rule amendments (though the example of night-time court hours suggests there are clearly exceptions). However, some rules with clearly substantive implications (such as state or federal rules on class action litigation, evidentiary privileges or allocation of costs) would undoubtedly command the attention of other interest groups (such as consumers). In addition, rules governing attorneys fees could have significant economic effects when applied to gargantuan corporate litigation. And, even transcripts costs can run into thousands of dollars and might similarly command wide rule-making interests.

Thus, the effects of the judicial rule-making process can be very substantial, and when dealing with rules with substantial effects it should reflect the best ideals of legislative politics. The foremost ideal is that all affected interests must be able to participate effectively.

II. Court administration

The effort to gain control of the rule-making process has been one major means of letting the courts control administrative policy. The other has been the creation of court administration offices to perform administration functions for, and at the direction of, judges. Again, however, what was expected to be simply an instrument to increase judicial control has become today a vehicle for participation by those with other perspectives, skills, and goals.

Over the last 30 years, state court administrative offices or their equivalents have been established in all the states, and the number of trial court administrators has increased from under 50 in 1967 to over 400.[38] All but one of the federal circuits has a circuit executive as authorized by Congress in 1971. Just as important as the court administrators so titled are those clerks of court who are professional administrators in fact but not in title.

The objective of those who conceived and promoted the idea of a court administrative office is clear: it was to create a mechanism to do the administrative work for which judges do not have time. According to the American Bar Association's Court Organization Standards, the courts' "large volume of business requires that judges delegate as many non-judicial responsibilities as possible" to persons "able to discharge them efficiently and intelligently."[39] The National Advisory Commission concluded that "[t]he basic purpose of court administration is to relieve judges of some administrative chores and to help them perform those they retain."[40]

These recent viewpoints are not basically different from that of Vanderbilt, who perhaps best captured the spirit of the early idea when he wrote in 1949 about "what properly may be called the 'housekeeping' of the courts." The idea was that "judicial talent and efforts must not be wasted [and thus] should not be expended on the performance of nonjudicial activities." These he described as

> securing facilities for work-quarters, the necessary books, papers, pencils, and clerical and legal assistance [as well as] auditing the reports of [court expenditures], purchasing equipment and supplies, arranging for telephone and telegraph service and quarters, preparing estimates for appropriations and allocating the funds appropriated.[41]

The chores had to be done, but since the judges did not have the time to do them, court administrators would do the courts' housekeeping.

Changes in court administration

However, since the early days there have been changes—or at least new perceptions—both as to the house to be kept and

37. *See* Steven Flanders, *In Praise of Local Rules*, 62 JUDICATURE 28 (1978).

38. These data are provided in David Saari MODERN COURT MANAGEMENT: TRENDS IN THE ROLE OF THE COURT EXECUTIVE 32-33. Washington, D.C.: Government Printing Office, 1970; and Geoffrey Mort, *Court Administrators Professional Associations*, 1 ST. CT. J. 16 (1977).

39. American Bar Association, *supra* n. 32, at 87.

40. National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON COURTS 171. Washington, D.C.: Government Printing Office, 1973.

41. Vanderbilt, *supra* n. 10, at 63-64.

the various ideas about how to keep it. Few today think of court administration simply in terms of keeping pencils and paper available and telling the legislature when more money is needed. A court system's administration now requires not only the subtle management skills that it has always required—such as negotiation and consensus building—but also a variety of technological expertise. It may require, for example, persons who can develop automated management information systems, sophisticated techniques of jury selection and utilization, and the management of courts' personnel and multi-source budgets. There is also increasing need for persons with the ability to forecast workloads and carry out research that facilitates effective planning.

In addition, there are now differences that go beyond the changing skills of professional administrators. James Powers has observed that the new breed of court professionals differ from traditional court employees who are characterized by their loyalty to the institution and to established ways of doing things. The newcomers, with backgrounds in administrative environments, seek dispersed authority in order to make their own jobs more challenging, and they have a higher tolerance for the ambiguity of any complex organization.[42]

These new court administration functions are something quite different from mere "housekeeping" chores that judges can easily delegate, much as one instructs the housekeeper to wax the floor. Moreover, as students of public administration have long recognized, policy making and administration are not two distinct functions, whereby policy makers can simply and confidently make policy and then delegate it to others to carry out. The implementation of a policy decision creates numerous policy decisions itself.

In short, a greater mix of professional skills necessary to administer the courts means that a greater variety of perspectives and influences will be brought to bear on that administration. Broadening these perspectives and influences may lead to at least three consequences, none of which is necessarily what court reformers of a generation ago thought would happen when they urged courts to get their own housekeepers.

Consequences of change

First, traditional assumptions about court administration will be challenged from within. For example, the early reformers who called for court administrators called just as vigorously for unified court systems. The academic counterpart of the court administration community, however, has produced a serious intellectual challenge to the fundamental assumptions underlying the unified court concept. They argue that, at least in some circumstances, central administration models frustrate creative management at the local level and ignore the teaching of the management disciplines on the behavior of professionally dominated organizations.[43]

To take another example, for a long time the exhortation to "experiment" was a clarion call to adopt new methods, referred to as "reforms." Now, reflecting in part the influence of empirical researchers in some court administrative systems, a court "experiment" is coming to mean an experiment in the classical sense, i.e., a controlled test of a program, on a limited basis, to determine whether it actually achieves the results attributed to it, and at what costs and benefits.[44]

Second, court administration offices can be the vehicle—perhaps the reluctant lightning rod—for various groups in the public that wish to affect the courts' administration. Mae Kuykendall has noted that "even mun-

42. James R. Powers, "Personnel Policy Development in a Court Setting" (mimeo, 1977).

43. *See, e.g.*, David Saari, *Modern Court Management: Trends in Court Organization Concepts-1976*, and Geoff Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUSTICE SYSTEM J. 19 and 35 (1976).

44. There are several examples of experimental research in the courts, such as Maurice Rosenberg, THE PRE-TRIAL CONFERENCE AND EFFECTIVE JUSTICE New York: Columbia University Press, 1964, and Jerry Goldman, AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN: AN EXPERIMENT IN JUDICIAL ADMINISTRATION. Washington, D.C.: Federal Judicial Center, 1977.

dane aspects of court administration" can serve democratic, as well as legal or administrative goals, and thus she asks

> How, for example, should we design the forms by which court business is transacted? Should they be provided for the public or should we assume attorneys can supply them? How much space should be used to explain rights? Who should be provided notice through additional copies? How accessible should papers be for public reference? What legal or laymen's details should be omitted to make court papers machine readable?[45]

Court administrators may serve as brokers for the demands of various groups for a chance to influence the courts' administration. As Paul Nejelski notes, "[t]he office of the court administrator may become the center of a complicated tug of war in this new age of popular participation."[46]

The most important question

Finally, discussion of these two possibilities perhaps begs the most important question—who will ultimately control the courts? It may seem premature to pose the question in light of the fact that not all court administration offices have the ability to perform the range of administrative and management functions described above—and those that have the ability to perform them may lack the authority. Nevertheless, court administration appears to be in a period of rising expectations. There is increasing sophistication and expertise within court administration offices, and the tasks performed are becoming more specialized.

In this context, three courses of development suggest themselves; they are not mutually exclusive. It is, first, not out of the question that the fascination with professional court managers will cool, and that the office of court administrator will, like many judicial councils, be replaced by other approaches to court management. Or, a second possibility is that judges and court administrators may develop genuine partnership approaches to managing the courts, a hybrid management team with greater capabilities than either could offer standing alone.

And, finally, increasing managerial and technological sophistication, while necessary, may anger a more troublesome development. It is possible that a sort of judiciary technocracy may be created among court managers, resulting in a managerial revolution in the courts whereby whatever accountability the public has through the judges is undermined by the lack of accountability the managers have to the judges.[47]

Twentieth century court reform efforts have sprung from a desire to insure that the courts had the authority to make procedural rules and control their own administration. Judicial rule-making and court administration offices were the vehicles created to meet those goals. Other people, however, have also sought to influence how the courts do their business, to share some of the judges' power.

Ironically, the means for that sharing appear to be conveniently in place, put there by early court reformers for quite narrower purposes. At the very least, this suggests the wisdom of Felix Frankfurter's observation that "reforms have a way of not turning out according to the expectations of their architects."[48] Though reformers intended judges to use the two new tools of rule-making and professional administration to tighten their control over the courts, the tools themselves are increasingly bringing judges into consultation and cooperation with others as they work with those instruments. □

45. C. Mac Kuykendall, *Should Hidden Standards Shape Our Courts?* 61 JUDICATURE 57 (1977).

46. Paul Nejelski, *Judging in a Democracy: The Tension of Popular Participation*, 61 JUDICATURE 166, 175 (1977).

47. I am grateful to Charles Grau of the American Judicature Society not only for stressing the importance of the point, but also for the language from which I have borrowed heavily.

48. I am grateful to Professor Jerry Goldman of Northwestern University for calling my attention to this observation of Justice Frankfurter, and for its citation, Frankfurter to William Denman, May 29, 1943, Box 51, Frankfurter papers.

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LEGISLATIVE CONTROL OVER JUDICIAL RULE-MAKING: A PROBLEM IN CONSTITUTIONAL REVISION

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The allocation of the power to make court rules is a topic of central concern in the review and revision of state constitutions. In this Article, Professor Levin, teacher and author of numerous articles on procedure and evidentiary rules, and his co-author and student, Mr. Amsterdam, present their program for a division of responsibility between court and legislature.

Naked struggle for power between coordinate branches of government has not been unknown in the United States. The familiar episodes have grown out of grand issues which invited dramatic clashes of mighty forces. When these have occurred the judiciary has not always stood aloof from the fray, as the history of the ill-fated Court-packing plan of the thirties demonstrates. But lesser conflicts have posed problems for legislative and judicial minds: who shall write headnotes,[1] when cases shall be decided,[2] even what manner of paper shall be used for opinions.[3] The judge locked out of court and waiting with the

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1. *In re* Griffiths, 118 Ind. 83, 20 N.E. 513 (1889), held invalid a statute requiring the court to make a syllabus of each opinion.

2. See the holding in Atchison, T. & S.F. Ry. v. Long, 122 Okla. 86, 251 Pac. 486 (1926), discussed in text at note 149 *infra*. A similar holding is Scharlo v. State, 105 Ohio St. 535, 138 N.E. 63 (1922).

3. In Houston v. Williams, 13 Cal. 24 (1859), the court held unconstitutional as an encroachment upon judicial independence a statute requiring written opinions in all appellate court decisions. Field, J. wrote, for the court: "If the Legislature can

litigants in the corridor as a result of controversy over room assignments,[4] the elevator operator de jure but not de facto,[5] the judge-made janitor denied his executive pay checks [6] are not heroic figures, yet they have left a legacy of increased understanding in the difficult area of separation of powers. Neither epic nor mock-epic, these struggles have a drama of their own [7] and a cogent contemporary significance. They reflect a facet of the difficult and recurring problem of allocation of authority between court and legislature.

To examine afresh such allocation of power is a central concern of Convention or Commission whenever a state's basic charter is subjected to review. In the course of such review there must inevitably be posed this question: what should be the place of the legislature in the control of the courts and their business? To deal with this question

require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?" *Id.* at 25.

4. Dahnke v. People, 168 Ill. 102, 48 N.E. 137 (1897), was a proceeding in criminal contempt involving a county courthouse custodian who, under the directions of the board of county commissioners, had changed locks on the courtroom door during adjournment and refused readmittance to the judge, sheriff, bailiffs, attorneys, parties and witnesses in an attempt to enforce the board's assignment of particular courtrooms to individual judges. Said Magruder, J., "To make the judges of our courts depend upon a legislative or political body for the rooms in which they shall hold their sessions . . . would be to destroy the dignity and independence of the judiciary." *Id.* at 109, 48 N.E. at 140.

5. Board of Comm'rs v. Stout, 136 Ind. 53, 35 N.E. 683 (1893). The board of commissioners sued for an injunction to restrain the sheriff from operating the courthouse elevator. The sheriff, under orders from the circuit court, had seized control of the elevator and ousted its commission-appointed operator in the course of a hassle between court and board as to the hours of operation of the car. The board, in retaliation, sought to shut down the elevator altogether. The Supreme Court of Indiana, while judging the controversy "not seemly," upheld the power of the court and denied injunctive relief.

6. *In re* Janitor, 35 Wis. 440 (1874), held void an order of the state superintendent of public property dismissing the court-chosen janitor of the supreme court. A statute granting to the superintendent the power of control over the custodial personnel of the capitol was held by the court not to vest in said superintendent jurisdiction over the person of the court janitor, but "the power to remove or appoint the janitor is possessed by the court." *Id.* at 421.

7. A "spark thrown off in the clash of forces now contending for dominance in the administration of justice" is McCormick's characterization of Kolkman v. People, 89 Colo. 8, 300 Pac. 575 (1931). McCormick, *Legislature and Supreme Court Clash on Rule-Making Power in Colorado*, 27 ILL. L. REV. 664 (1933). Under a grant of rule-making power from the legislature, the supreme court had in 1929 promulgated a rule the effect of which was to permit trial judges to comment on the evidence to the jury. Following such comment Kolkman was convicted of hog-theft and appealed. Thereafter, but before the case could be decided on appeal, the legislature passed a statute revising its earlier grant of power and expressly declaring that the court should make no rule which would permit comment on the evidence. The majority opinion makes no express reference to this statute, but does undertake a spirited defense of the inherent right of a court to make its own rules without the authorization of statute. It appears from a dissenting opinion that the majority opinion was rewritten to include this discussion as a result of the legislative action. The court's opinion indicated that a search of the constitution revealed "no provision therein expressly directing or permitting the legislative or executive departments to make rules with reference to trial procedure in the judicial department of the government," and cited Wigmore.

it is necessary to consider, however briefly, some of the history, the present patterns of division of power, the doctrines and dogma which define them, all of these in the light of considerations which to us appear basic.

Toward Constitutional Recognition of the Rule-Making Power

From a constitutional point of view, the major problems of today were begotten by the successes in procedural reform achieved over the past quarter century. It may be hard to conceive of the abolition of the bill of particulars or the availability of pre-trial hearings as responsible for constitutional issues. It becomes less difficult when one recognizes that the advances in adjective law during this period were achieved primarily as the result of persuading legislators to invest appellate courts with rule-making powers,[8] a disposition of authority which proved so felicitious that it gave rise to insistent demand that it be guaranteed by express constitutional provision.

For decades, if not for centuries, control over practice and procedure has been the subject of a concurrent jurisdiction.[9] There were the courts with an alleged inherent power to engage in rule-making,[10] and there were the legislatures which in fact exercised and were, with but rare dissent, conceded ultimate authority over virtually the entire procedural area.[11] Nor was this basic allocation of power challenged

All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276 (1928). This amounted, in the words of a dissenting justice, to "this warning to the Legislature: Hands off! There must be no more codes of civil procedure. . . ." Kolkman v. People, *supra* at 42-43, 300 Pac. at 590. In fact four opinions of some sixty-seven pages were written and reveal a harsh struggle of personalities among the members of the court.

8. The great landmark of this reform is of course the Federal Rules of Civil Procedure of 1938, important not only in their own right but for their profound and immediate stimulating influence upon procedural revision throughout the states. *States Move To Modernise Civil Procedure*, 24 J. Am. Jud. Soc'y 189 (1941); Mitchell, *The Federal Rules of Civil Procedure*, in David Dudley Field Centenary Essays 73, 79 (1949); Institute of Judicial Administration, Rule-Making Power of the Courts *passim* (1955). See also Clark, *The Influence of Federal Procedural Reform*, 13 Law & Contemp. Prob. 144, 159-61 (1948); Clark, *Two Decades of the Federal Civil Rules*, 58 Colum. L. Rev. 435 (1958). But it must not be forgotten that in England a virtually absolute control over all procedure had been placed in the hands of the bench and bar by the Judicature Act of 1873, which went into effect in 1875. Marvel, *The Rule-Making Power of the Courts*, 13 A.B.A.J. Supp. 14, 15 (1927); and that the federal courts in the United States had been exercising rule-making power in equity and admiralty under statutory grant from as early as 1842, Winberry v. Salisbury, 5 N.J. 240, 253, 74 A.2d 406, 413 (1950). It was to these earlier achievements that the reformers who led the fight for the Federal Rules appealed for authority. Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A.J. Supp. 12 (1927); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 602 (1926).

9. Cooley, Constitutional Law 49 (4th ed. 1931); Vanderbilt, Minimum Standards of Judicial Administration III (1949). Cases are collected in Annots., 158 A.L.R. 705 (1945), 110 A.L.R. 22 (1937).

10. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 601 (1926); Vanderbilt, *op. cit. supra* note 9; Annots., *supra* note 9.

11. *Ibid.* The most famous dissent is by Wigmore, *supra* note 7.

by those who sought to effect a unified federal procedure by way of court rule. Indeed, in the atmosphere created by 150 years of legislative control of judicial matters, it was inevitable that these reformers should have sought congressional mandate, that the Supreme Court should have been "enabled" to promulgate rules, and that the legislature should have retained a right of veto over what the Supreme Court might choose to adopt.[13]

The success of the federal endeavor stimulated a multi-pronged reform program by the American Bar Association,[14] the "keystone" [15] of which was the recommendation that state supreme courts everywhere be invested by statute with similiar rule-making powers. This was 1938. In the ensuing years the "trend throughout the country" has been to charge the courts with rule-making responsibility,[16] bench and bar have become "rule-conscious," [16] and the climate of the time is such that the "rule-making power of the courts . . . is brought into focus wherever procedural reform is undertaken." [17]

Understandably, the next step was to provide for constitutional grant of judicial rule-making powers whenever opportunity presented itself. By this expedient the legislative recalcitrance, not to speak of bitter opposition, which had come so close to aborting at its start the program which led to the Federal Rules might be avoided. The long and arduous political struggles to push through enabling acts, and the initial doubts as to the validity of delegation to judges of "legislative" authority over procedure [18] were still fresh in the minds of the reformers.[19] So too was the mounting evidence of the success of the Federal Rules which were being accorded the accolade of a "universal

12. It is interesting to note that this atmosphere and history carries over to influence the framing of constitutional provisions. See discussion of the New Jersey experience in Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 241-42 (1951).

13. ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (3d ed. 1952).

14. *Id.* at 10-11.

15. Winberry v. Salisbury, 5 N.J. 240, 253, 74 A.2d 406, 413 (1950).

16. Curd, *Substance and Procedure in Rule-Making*, 51 W. VA. L.Q. 34, 36 (1948).

17. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623 (1957).

18. See, *e.g.*, discussion in *In re* Constitutionality of Section 251.18, Wisconsin Statutes, 204 Wis. 501, 236 N.W. 717 (1931); and State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

19. For a history of the struggle for a federal enabling act, see Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 145-48 (1948). Note that Roscoe Pound, for example, a leader in the drive for the enabling acts also participated in the fight for constitutional grant of rule-making power to the courts. See Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 42 (1952).

chorus of approval" [20] and the more meaningful compliment of imitation, in whole or in part, by a majority of the states.[21] Failure to consolidate these gains would be folly.

Thus the recent history of constitutional drafting in this country came to reflect a consistent concern with rule-making by the judiciary. Since 1945, Alaska, Florida, Georgia, Missouri, New Jersey and Puerto Rico have adopted new constitutions.[22] In every one but that of Georgia rule-making power is expressly granted to the highest court of the jurisdiction,[23] and in Georgia the Constitutional Commission approved such a provision [24] only to have it deleted.[25] Whatever the weight of a "trend" of decision [26] in the forum of political action, it was being added to that of theorists and reformers [27] by establishing the feasibility and desirability of vesting rule-making power in the courts by constitutional mandate.

The Role of the Legislature

To concede this much as established, however, to decide in favor of a constitutional grant of judicial rule-making authority, is to resolve no more than a single, preliminary question. A host of others remain. What of the legislature? Shall it be turned out of the arena of practice and procedure, or shall there be reserved to the duly elected representatives of the people a right of veto over the actions of the court? If we choose to retain substantial legislative control, under what terms and within what limits shall that control be available? Shall court and legislature each have a right to act in areas not pre-empted by the other? If power is concurrent, shall both be equally responsible for rule-

20. Clark, *The Influence of Federal Procedural Reform*, 13 Law & Contemp. Prob. 144, 152 (1948).

21. Clark, *Two Decades of the Federal Civil Rules*, 58 Colum. L. Rev. 435 n.2 (1958). The text at this point adds: ". . . hardly a local jurisdiction remains unaffected."

22. Alaska, 1956; Georgia, 1945; Missouri, 1945; New Jersey, 1947; Puerto Rico, 1952. Florida New Judiciary Article, 1956.

23. See note 36 *infra*. See Pirsig, *The Proposed Amendment to the Judiciary Article of the Minnesota Constitution*, 40 Minn. L. Rev. 815, 820 (1956), *re* Minnesota's decision not to provide constitutionally for rule-making in the 1956 amended judiciary article.

24. 2 Records of the Commission of 1943-1944 To Revise the Constitution of Georgia 55, 58 (1946).

25. Ga. Const. art. VI, § 2-3708. From the statement of Roy Vincent Harris in the course of the debate before the commission, *supra* note 24, at 34, a legislature jealous of its prerogatives may have been an important factor. Promptly after adoption of the constitution, a statutory grant of rule-making power to the supreme court was enacted. Ga. Code Ann. § 81-1501 (Supp. 1955). The statute provides, however, that no rule shall take effect until ratified by the legislature. *Id.* § 81-1502.

26. See the discussion of "trends" in the text *infra* at note 121.

27. Indeed, the flood of rule-making literature is so great that citation is currently to bibliographies. See Joiner & Miller, *supra* note 17, at 623 n.1. In fact, one conscientious researcher a decade ago had already reported that "the literature in favor of the rule-making authority in the courts is now so extensive that even the bibliographies cannot be included here." Clark, *supra* note 19 at 160 n.54.

formulation, or shall the initiative be assigned to one with the task of review and evaluation left to the other? Or shall we attempt, as New Jersey appears to have done in 1948, subtly to differentiate between areas in which the court is immune from legislative review and other areas in which it remains subject to legislative veto? [28]

These are not questions of mere detail. They, and others in similar vein, are fundamental, for they indicate a range of possibilities grouped primarily about two competing major premises. The first affirms the desirability of full rule-making responsibility in a judiciary insulated from legislative interference. The second posits acceptance, in some form, of concurrent jurisdiction between the two coordinate branches of government. To choose the latter alternative is to stay within the broad framework of present practice. It is not, however, the simpler course nor does it represent acceptance of the status quo, for the conditions under which courts and legislatures shall exercise their respective jurisdictions must, of necessity, be examined afresh before being raised to the level of constitutional mandate.

Alternatives abound. We have mentioned five recently adopted constitutions which expressly affirm rule-making power in their courts. In addition to these, California,[29] Maryland,[30] Michigan,[31] Missouri [32] and Nebraska [33] now provide for the making of rules by the judiciary.[34] In Illinois, the proposed Judiciary Article to be submitted to the voters in November 1958 [35] makes similar provision. These eleven documents represent no less than eleven differing solutions to the problem of allocating responsibility between court and legislature.[36] They

28. N.J. CONST. art. VI, § 2, ¶ 3; see note 36 *infra*.

29. CAL. CONST. art. VI, § 1a (1926); see note 36 *infra*.

30. MD. CONST. art. IV, § 18A (1944); see note 36 *infra*.

31. MICH. CONST. art. VII, § 5; see note 36 *infra*.

32. MO. CONST. art. V, § 5; see note 36 *infra*.

33. NEB. CONST. art. V, § 25 (1920); see note 36 *infra*.

34. The California Constitution, art. VI, § 1a (1926), vests power in a Judicial Council composed of eleven judges from the courts of all levels; the other constitutions vest power in the respective highest courts of the jurisdiction. For brief consideration of the role of the judicial council where rule-making power is vested in the highest court, see text *infra* at note 50.

35. *Ill. Const. Proposed Amendment art. VI, § 3*, ILL. ANN. STAT. (Supp. 1957).

36. The Philippine constitution represents in pure form the doctrine of judicial initiative and ultimate legislative review. The supreme court is granted "the power to promulgate rules concerning pleading, practice, and procedure in all courts and the admission to the practice of law." All pre-constitutional laws regulating procedure are repealed as statutes and declared rules of court, subject to modification by the court, so that the way is cleared for a unified system of procedure by court rule. It is declared that such rules "shall not diminish, increase, or modify substantive rights." Legislative review is sweeping and unqualified: "The Congress shall have the power to repeal, alter, or supplement the rules concerning pleading, practice and procedure, and the admission to the practice of law in the Philippines." PHIL. CONST. art. VIII, § 13.

The intendment of the proposed Judicial Article of the State of Illinois is apparently similarly to establish a scheme of concurrent power with express dictate

make it abundantly clear that it is impossible cavalierly to reject any of the available alternatives. Yet election among them in the dis-

of legislative supremacy in the event of conflict between rule and statute; the power of the court to promulgate rules is "subject to law and laws hereafter enacted." *Ill. Const. Proposed Amendment art. VI, § 3,* ILL. ANN. STAT. (Supp. 1957). This express declaration of legislative dominance is particularly significant in that the original draft of a proposed Judiciary Article prepared by the Joint Committee on Judicial Article of Chicago and Illinois State Bar Associations had unequivocally vested the rule-making power in the courts with no provision for legislative review. 1952 U. ILL. L. FORUM 592; Sears, *A New Judicial Article for Illinois,* 40 A.B.A.J. 755, 804 (1954). "After considerable research and soul-searching," the Committee had "determined that rules of practice and procedure were an essential aspect of the judicial power and that the independence and integrity of the judicial system required that such power be vested exclusively in the courts." Cohn, *The Illinois Judicial System Under the Proposed Judicial Article,* 46 ILL. B.J. 593, 602 (1958). In this determination the legislature did not concur, but explicitly subjected the rule-making power to "laws hereafter enacted," in which provision "future laws relating to procedure were clearly intended to be included." Trumbull, *Why Lawyers Should Support the Judicial Amendment,* 46 ILL. B.J. 434, 448 (1958). In like manner the Maryland Constitution vests in the court of appeals power to make rules "which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." MD. CONST. art. IV, § 18a (1944).

An approach still more restrictive of judicial power is that of the California constitution. A 1926 amendment creates a Judicial Council of eleven judges chosen by the chief justice in specified numbers from the courts of all trial and appellate levels, to "meet at the call of the chairman or as otherwise provided by it." The Council is vested with power to "adopt or amend rules of practice or procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force." CAL. CONST. art. VI, § 1a(5) (1926). But inasmuch as the field of procedure was already exhaustively covered by statute in 1926, the grant of a power which could not act to supersede even pre-amendment law was of little practical effect. It was clear that the amendment had reserved "to the legislature and the people the primary and higher right to provide rules of procedure for our courts, with the secondary right in the Judicial Council to adopt rules only, when and where the higher authority of the Legislature and the people has not been exercised." Lane v. Superior Ct., 104 Cal. App. 340, 344, 285 Pac. 860, 862 (1930); Stockton Theaters v. Palermo, 47 Cal. 2d 469, 476-77, 304 P.2d 7, 11 (1956). The Council appears rather an advisory panel to the legislature than an independent power; it is to "submit to the Legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure." CAL. CONST. art. 6, § 1a(5) (1926). In fact, California procedure remains almost entirely governed by code, INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS 4 (1955), except that rules of the Judicial Council now govern all appellate procedure under special statutory authority. CAL. CODE CIV. P. § 961, CAL. PENAL CODE § 1247K.

In similar manner, an amendment to the Nebraska constitution empowered the supreme court to "promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end the court may, and when requested by the Legislature by joint resolution, shall certify to the Legislature, its conclusions as to the desirable amendments or changes in the general laws governing such practice and proceedings." NEB. CONST. art. V, § 25 (1920). This merely advisory and statute-supplementing role of the court was converted into full rule-making power by legislative enabling act in 1939, but when the court proposed a battery of rules to the legislature in 1943, the legislature rejected the rules and repealed the enabling act. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 117 (1949). Thus in California and Nebraska the full and absolute authority over procedure remains in the legislature; and what is constitutionally granted to the courts proves merely a patchwork power which, as Vanderbilt points out, is in the final analysis no power at all. "The *supplementary* power is common. All but a few courts exercise such power to some extent. The *complete* power is the true rule-making power both historically and analytically; a court cannot be said to be exercising rule-making power unless its rules override statutory rules." *Id.* at 92.

The Missouri constitution of 1945 limits judicial rule-making in terms of subject matter. The supreme court is empowered to make rules of practice and procedure

tribution of power is a fundamental and inevitable problem of constitutional revision. Any serious attempt at drafting a judiciary article must meet the issue frontally. It cannot be ignored.

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for all courts, subject to the proviso that "the rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal." Moreover, even outside of the charmed circle within which judicial power is forbidden, "any rule may be annulled or amended by a law limited to the purpose." Mo. CONST. art. V, § 5. In terms the grant seems more restricted than that of the Philippine provision or the Illinois proposal. But dictum in a recent Missouri Supreme Court case appears to unsettle the legislative hegemony by attack from another angle. While recognizing that "the Legislature is given power to annul or amend" court rules, the court asserts that "a rule of practice and procedure established by this court under the authority of section 5 . . . would prevail over a previously enacted statute if there was a direct conflict." See State v. Adams, 365 Mo. 1015, 1019, 291 S.W.2d 74, 77 (1956). Thus the court's language would seem to place ultimate power over matters of procedure in Missouri in a sort of no man's land between court and legislature and to invite, in case of conflict, a cyclic scramble for the last word. See the South Dakota statute set out at note 130 *infra*.

An altogether different kind of restriction upon court control of procedure is demonstrated by the judiciary article of the Puerto Rico constitution: "The Supreme Court shall adopt for the courts rules of evidence and of civil and criminal procedure which shall not abridge, enlarge or modify the substantive rights of the parties. The rules thus adopted shall be submitted to the Legislative Assembly at the beginning of its next regular session and shall not go into effect until sixty days after the close of said session, unless disapproved by the Legislative Assembly, which shall have the power both at said session and subsequently to amend, repeal or supplement any of said rules by a specific law to that effect." P.R. CONST. art. V, § 6. Under the immediate supervisory power of the legislature, the court is given an initiative authority over procedure which is expressly extended into the area of evidence and to that extent is wider than the power granted by any other constitution. But the price it pays for this extended scope is a loss of flexibility. No procedural revision need be delayed beyond the close of the next legislative session; but every revision must be delayed at least that long. Moreover, it remains open to the legislature to intervene at will over the full range of practice and procedure with no other deterrent to hasty, ill-considered action than that it be by "specific law."

At the other extreme from jurisdictions which severely circumscribe the judicial authority is New Jersey where under the constitution of 1947, N.J. CONST. art. VI, § 2, ¶ 3, and the celebrated case of Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950), the power of the courts has reached its apogee. See text at note 108 *infra*. The constitutional mandate directs that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." In Winberry v. Salisbury the appellate division of the superior court, holding that this provision caused rules of court made under its authority to supersede all conflicting pre-constitutional statutes governing procedure, indicated that nevertheless "the legislature is given the final word in matters of procedure; it may expressly or by implication nullify or modify a procedural rule promulgated by the Supreme Court, or it may take the initiative in a matter of procedure when it deems that course wise." 5 N.J. Super. 30, 34, 68 A.2d 332, 334 (App. Div. 1949). This was dictum. Rejecting it, Chief Justice Vanderbilt for the majority of the supreme court replied "[T]he phrase 'subject to law' cannot be taken to mean subject to legislation. . . . The only interpretation of 'subject to law' that will not defeat the objective of the people to establish an integrated judicial system and which will at the same time give rational significance to the phrase is to construe it as the equivalent of substantive law as distinguished from pleading and practice. . . . We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such." Winberry v. Salisbury, *supra* at 245, 247, 255, 74 A.2d at 409, 410, 414. With this pronouncement the Supreme Court of New Jersey became the first court to declare its absolute independence of the legislature in the realm of procedure. Judicial supremacy was judicially recognized. The rule came to be stated that "where there is a conflict between the statute and the rules, the rules shall govern." Ward v. Public Serv. Elec. and Gas Co., 14 N.J. Super. 148, 151, 81 A.2d 203, 204 (L. 1951),

JUDICIAL RULE-MAKING: PLUS AND MINUS

No constitutional scheme which accepts judicial rule-making can be evolved rationally without an inventory of the plus and the minus

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and that only "in the absence of a controlling rule" is procedural legislation valid. Streader v. Streader, 17 N.J. Super. 123, 127, 85 A.2d 532, 534 (App. Div. 1951).

Two years later the court was confronted with a problem of allowing attorney's fees. A judicially promulgated rule authorized such fees in the discretion of the trial court in the face of a statute which, it was urged, expressed a contrary legislative intent. The Attorney-General, arguing that counsel fees should not be awarded in such a case, urged that the court should "out of comity yield to the legislative provisions as to procedure. . . ." State v. Otis Elevator Co., 12 N.J. 1, 14, 95 A.2d 715, 722 (1953). A divided supreme court found that the rule applied, holding, moreover, that it was an abuse of discretion for the lower court not to award attorney's fees. Answering the argument of the Attorney-General the court referred "to the much criticized federal doctrine of judicial deference," adding, "we will do well to avoid falling into the same error in this state. On the other hand, we must and do realize that our work as a judicial establishment is always subject to the will of the people; if we do not do our task well, they can and should and undoubtedly would make such changes that they may think wise by way of constitutional amendment." State v. Otis Elevator Co., *supra* at 17, 95 A.2d at 723. It is significant that the court chose not to consider whether the statute did in fact express a legislative intent against the payment of the counsel fees in question and, further, that it did not consider the fact that the statute antedated the adoption of the 1947 constitution. Thus, separation of powers in New Jersey has become a matter of very tangible fact. Mutually exclusive realms of legislative and of judicial power extend away on either side of the fine line that is said to separate "substance" from "procedure." Within its separate realm, the court has declared itself responsible only "to the will of the people." For fuller discussion see note 119 *infra*.

The only other states where under the governing constitutional provision a *Winberry* result might obtain are Michigan and Florida. The Michigan constitution of 1908 provides that "the supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings." MICH. CONST. art. VII, § 5. Outside of this specific mandate, the legislature is not expressly empowered to make laws governing procedure. It is perhaps surprising under these provisions that "the promulgation of court rules by the Michigan Supreme Court has been sporadic, piecemeal, and incomplete." Joiner & Miller, *supra* note 17 at 639. Understandably, "the vast bulk of practice regulations were created by statute." *Ibid.* Which power is supreme in case of conflict between rule and procedural statute may appear to have been settled in favor of court rules by Berman v. Psiharis, 325 Mich. 528, 39 N.W.2d 58 (1949). Compare, however, Youngs v. Peters, 118 Mich. 45, 76 N.W. 138 (1898) (court rule cannot override tax law provision concerning when deeds may issue). Neither opinion has adequate discussion of the problem. A recent case, People v. Stanley, 344 Mich. 530, 75 N.W.2d 39 (1956), typified by a commentator as "a moving statement in support of the superiority of inherent and constitutional rule-making when brought into conflict with legislative meddling with practice," Joiner & Miller, *supra* note 17 at 641-42, proves upon close reading to contain nothing whatever about judicial supremacy, and no conflict of rule with valid statute was at issue in that case. FLA. CONST. art. v, § 3, providing: "The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court," appears as yet untested.

The Alaskan solution represents a compromise which secures some measure of judicial insulation without sacrificing all power of legislative review. Article IV of the constitution ratified in 1956 provides: "The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house." ALASKA CONST. art. IV, § 15. Thus rule-making power is placed firmly in the hands of the judiciary. Legislative overrule is preserved under terms which make its exercise neither as easy as ordinary legislation nor as difficult as constitutional amendment. Legislative tinkering is discouraged, but the power of the elected representatives of the people is available at last resort to curb flagrant abuse. See text at note 180 *infra*.

inherent in the rule-making power. Ultimately, the checks and balances to be built into a set of constitutional provisions, or the decision to do without them, must reflect an attempt to maximize the potential for good in making courts responsible [37] for adjective law while minimizing the risks of assigning them this authority. Thus the terms under which rule-making may be entrusted to the courts, and the scope and conditions of legislative veto if one is to be provided, can be formulated only after inquiring why the vesting of rule-making power in the judiciary is intrinsically sound, what, specifically, are the advantages promised, and what dangers or disadvantages run with the grant. To retain the advantages while reducing the risks is to approach the ideal.

We are led to the familiar. The merits of rule-making have been thrice-rehearsed, indeed oftener,[38] so that the briefest survey will suffice. Long ago Pound [39] and Wigmore [40] propounded convincing arguments against relying upon legislative management of judicial procedure: legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems; legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed; legislatures are subject to the influence of other pressures than those which seek the efficient administration of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a bar association molders in committee; [41] and legislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant reexamination of procedural methods.

37. Some constitutional phraseology is mandatory in form, some permissive. Under the New Jersey constitution, art. VI, § 2, ¶ 3, which dictates that "the Supreme Court shall make rules" the court has written that, "the rule-making power of the Supreme Court, however, is not a privilege to be exercised by it at its option; on the contrary, it is a duty that the Justices of the Supreme Court must exercise as part of their constitutional obligations in cases involving the State quite as much as in private litigation. . . ." State v. Otis Elevator Co., 12 N.J. 1, 14, 95 A.2d 715, 722 (1953). Similarly the Maryland constitution, art. IV, § 18, directs that "it shall be the duty of the Judges of the Court of Appeals to make and publish rules and regulations for the prosecution of appeals to said appellate court. . . ." *Cf.* the less mandatory language of Mo. CONST. art. V, § 5: "The supreme court may establish rules of practice and procedure for all courts."

38. See note 27 *supra*.

39. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926); *Regulating Procedural Details by Rules of Court*, 13 A.B.A.J. Supp. 12 (1927).

40. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

41. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 44-45 (1952).

Moreover, it must be remembered that a very large part of maintaining maximum effectiveness in the courts does not lie in drastic wholesale procedural reform, but in the necessary minor alterations of single rules from time to time as experience dictates, and such small matters as these inevitably fare badly when they must compete for legislative attention. Even the best codes have the defect of rigidity; they cannot be changed without "all the pomp and circumstance of repeal or of legislative amendment" [42] and while in effect bind the courts absolutely and without exception, even in situations where they may work inefficient or unjust results. If the courts attempt to adapt an antiquated or too-general rule to their current particular needs by a process of distinction and reinterpretation, the result is uncertainty; a few litigants will be trapped and badly injured, many more will be forced to argue their cases on points of procedure. Codes tend to foster litigation of procedural issues,[43] since the legislature cannot clarify by simple pronouncement whatever ambiguity may inhere in its codes and the courts themselves can provide clarification only in the process of adjudication. Court rules, on the other hand, are flexible in application, easy of clarification, and rapid of amendment should amendment be required. They are the work of an agency whose whole business is court business and for whom court efficiency can become a major interest, an agency keenly aware of the latest problems and fully capable of bringing to bear in their early solution a long and solid experience.

"It is inconceivable," wrote Chief Justice Terrell anent the rule-making power, "that litigants of the present who transact business by the press of a button, . . . traverse the continent overnight by airplane, hop to Europe by Clipper, and spend the weekend in Miami out of New York, would be content like Balaam, to travel the highway of justice on the back of an ass. . . . I think we owe it to society to hike the administration of justice off the ass. . . . " [44] To date some thirty states have been trying to hike the administration of justice off the ass with the aid of rule-making powers vested, wholly or in significant part, in their courts of last resort.[45]

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42. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 602 (1926).

43. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623, 643 (1957), states that "a random comparison of decisions by courts exercising rule-making power before and after their court rules were adopted indicates that there are fewer decisions turning on procedural questions after the rules were adopted."

44. Petition Fla. State Bar Ass'n for Promulgation of New Fla. R. Civ. P., 145 Fla. 223, 230, 199 So. 57, 60 (1940).

45. ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 17 (3d ed. 1952); INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS (1955).

Opposition to regulation of practice and procedure by court rule was concentrated on a few major points.[46] The first cluster of arguments was intended to show that the courts either could not or would not exercise the power. This was pre-1938. There was much in history to support that position,[47] but by now opposition on this ground has evaporated almost entirely.[48] The record of recent experience has been convincing:[49] despite crowded dockets and backlogs, despite a primary interest in adjudication, despite an alleged inertia and disinclination to act, courts have in fact acted and the results have not been unworthy. The second cluster concerned a supposed inability of the judiciary to utilize techniques, such as public hearings, which would involve interested parties in the development and consideration of new adjective law. Indeed, some of the literature reads as though the new rules of procedure would emerge full-blown from a few Saturday morning conference sessions. Once again, history has laid low these fears. This is not to suggest that the optimum in tapping all available resources—bench, bar and law schools[50]—has been finally reached. Rather, on the Federal scene a transition is now taking place which may be expected to improve on the Advisory Committee system by placing the Judicial Council in a role of new prominence.[51] Nor should one minimize the potential significance of such change. The important thing, however, from the point of view of our inquiry is that, in the

46. See Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441 (1937); Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council*, 10 IND. L.J. 202 (1935); 2 RECORDS OF THE CONSTITUTIONAL COMMISSION OF 1943-44 TO REVISE THE CONSTITUTION OF GEORGIA 34 (1946); Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW. U.L. REV. 443, 450 (1952).

47. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 600 (1926); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623, 639-40 (1957).

48. Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW. U.L. REV. 443, 452 (1952); Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958); Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 149 (1948). There have been other objections, not mentioned in the text, which appear likewise to have evaporated as, *e.g.*, the argument that "public opinion is so sharply divided on some of the more important questions of procedural reform that for courts to settle them would bring down on their heads a storm of criticism." Warner, *supra* note 46, at 448.

49. See note 8 *supra*.

50. These three sources of assistance were mentioned, in reverse order, by Mr. Chief Justice Warren in a communication read by Mr. Justice Clark at a panel discussion reported in *The Rule Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 118-19 (1958).

51. *Id.* at 117 discussing a proposed amendment to 28 U.S.C. § 331, which section directs, in part, that there shall be an annual Judicial Conference of the chief judges of the judicial circuits presided over by the Chief Justice of the United States and which "shall make a comprehensive survey of the condition of the business of the courts of the United States and prepare plans for the assignment of judges to or from circuits where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business." The statute was enacted Pub. L. No. 513, 85th Cong., 2d Sess. (July 11, 1958).

words of Mr. Chief Justice Warren, "the responsibility of the Supreme Court will not be lessened." [53] And if further evidence be needed, Professor Moore's valuable comparison of the old and new techniques [58] by which the Supreme Court avails itself of "an informed judgment" on which to rely [54] adequately demonstrates that the differences are of small moment in terms of the basic allocation of power between court and legislature.[55]

Finally, we must consider a number of objections which, taken together, challenge the fitness of supreme court judges and justices to make the necessary policy determinations involved in rule-making.[56] At the least these would question that the best qualified individuals for such decisions are the judges of the highest appellate bench, "many of whom have reached an age in life when all change seems abhorrent." [57] Variations on the theme abound: judges will prefer their own convenience in such matters as requiring printed briefs to legitimate interests of litigants in reducing costs; [58] they are too long removed from practice to be "in touch" with problems of the bar or, indeed, of the trial bench; [59] and they are not to be entrusted with policy decisions which may affect "the liberties of citizens." [60] These arguments reflect a constant concern that judicial rule-making will impinge on substantive rights,[61] not because judges would make rules governing sub-

52. *The Rule Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 118 (1958).

53. *Id.* at 125-33. Professor Moore stresses that "final responsibility should remain where it now is, in the Supreme Court." *Id.* at 132. The reference to "final" responsibility, it is clear from the context, refers to the Court vis-à-vis the Judicial Council rather than the Congress. Judge Clark lists "retention of the present authority of the Supreme Court and of the existing rule-making statutes without amendment" as the first of three main features of the proposal that the Judicial Council be utilized in rule-making. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 444 (1958). And in more colorful language: "The Court as the ultimate source of power is still the keystone of the arch." *Ibid.*

54. See Clark, *supra* note 53, at 441 and the reference to Mr. Justice Frankfurter's position at n.30.

55. A court charged with the responsibility of rule-making will, in the normal course, seek aid in discharging that responsibility. An advisory committee is a common device. This may well be supplemented by utilizing a Judicial Council. See, for a detailed description of the practice of the New Jersey Supreme Court, the discussion in Winberry v. Salisbury, 5 N.J. 240, 253-54, 74 A.2d 406, 413 (1950). See also State v. Otis Elevator Co., 12 N.J. 1, 15, 95 A.2d 715, 722 (1953). *Cf.* Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council*, 10 IND. L.J. 202 (1935): "The question whether rules of procedure should originate in a judicial council, does not necessarily depend on whether the final authority for their promulgation is to be the legislature or the courts."

56. Trumbull, *supra* note 48, at 450-52; Warner, *supra* note 46, at 447-51; Sunderland, *supra* note 55, at 210-11.

57. Warner, *supra* note 46, at 451.

58. *Id.* at 449: "That case might be designated pocketbooks of clients v. eyesight of supreme court justices."

59. Trumbull, *supra* note 48, at 451.

60. Warner, *supra* note 46, at 447.

61. Trumbull, *supra* note 48, at 451, 452.

stantive law as such, but rather because procedure and substance are inextricably interwoven.[62]

It is of undoubted significance that the proponents of these arguments rarely take the position that it is really best for legislatures to deal with the full battery of procedural provisions, that they should exercise detailed control over court business. Where the debate has been formulated on a court v. legislature basis the conclusion may appear to be in terms of complete legislative responsibility,[63] yet the force of the reasoning and the tenor of the discussion do not carry this far. In short, it would be sufficient to meet these objections if the law were to devise a system of concurrent jurisdiction which could assure ultimate legislative power on those matters of policy which should be decided by a body "subject to the popular will," [64] while retaining judicial initiative and primary responsibility in the vast range of technical material which is the bulk of the adjective law. This is not to suggest a technical vs. policy dichotomy; no such division will withstand analysis. It is to suggest that a system which charges the judiciary with the responsibility for the development of adjective law while retaining for the legislature, on appropriate terms, power to reassess and evaluate, may come close to maximizing the potential for good in the rule-making process while minimizing the risks inherent in it.

It becomes necessary to analyze these problems in terms of the subject matter of rule-making, examining the specifics of that with which courts deal, and by comparison, of that which is beyond their ken. We turn to consider the grist of the rule-making mill.

What Is Procedure?

Nothing could be clearer than the fact that courts in the exercise of the rule-making power have no competence to promulgate rules governing substantive law. Statutes which make the point are supererogatory.[65] Yet virtually everyone concedes that "rational separation is

62. *Ibid.* *Cf.* statement by Joseph A. Padway, Chief Counsel, AFL, *Hearings Before the House Committee on the Judiciary on H.R. 8892 and the Rules of Civil Procedure*, 75th Cong., 3d Sess. 37-51 (1938). See text at note 80 *infra*.

63. *Compare* the revealing questioning of Padway, *supra* note 62, at 46 *with id.* at 47.

64. Warner, *supra* note 46, at 447.

65. Heckel, *Constitutional Law, Survey of the Law of New Jersey 1950-1951*, 6 Rutgers L. Rev. 27, 30 (1951). Note that "while the courts necessarily make new substantive law through the decisions of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power." Vanderbilt, C.J., in Winberry v. Salisbury, 5 N.J. 240, 248, 74 A.2d 406, 410 (1950).

well-nigh impossible." [66] We propose in this section to consider the difficulties of categorization for the primary purpose of shedding light on our central question: what role should the legislature be assigned with respect to rule-making? No legal litmus test with which to distinguish substance from procedure will emerge. Nor do we argue for abandonment of the terms and the distinction. No preferable alternatives suggest themselves and new words alone are likely to compound the confusion. Exploring the elusive line between substance and procedure is, however, rewarding in revealing factors relevant to the place of the legislature.

Costs, Time and Venue: Policies in Procedure

In New Jersey, where rule-making power has been held to be vested in the courts with no right of legislative veto, the supreme court has held the taxation of attorney's fees as costs to be a matter of procedure.[67] In the face of a conflict between rule and statute a unanimous bench disposed of the substance-procedure problem with a single, peremptory sentence: "The taxation of costs is essentially procedural, generally affecting the remedy only." [68] Of course, in that case only $6,500 was involved, while in England taxation of costs against one party can run to £89,000 in a case brought for only £40,000.[69] If the power of decision be in the court exclusively a virtual revolution in the conditions of litigation could be effected with no recourse short of constitutional amendment. Consider a lesser problem, taxing the cost of discovery. Putting to one side stenographic charges, often an item of substance in itself, what of the complications of distance where, *e.g.*, New York litigants propose California depositions? Payment of $695, including attorney's expenses of $395 and fees of $300, was made a condition of the taking of one relatively short deposition in such a case.[70] More interesting problems develop when a liti-

66. Rutledge, J., dissenting in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 559 (1949). Nor is the difficulty solely one of failure to recognize the different purposes for which substance may be distinguished from procedure. We may avoid the trap of applying doctrine developed in the context of two-state conflict of laws situations or of *Erie*-spawned problems of federalism without discovering in the "pulls" of the rule-making area sufficient basis for "rational separation."

67. John S. Westervelt's Sons v. Regency, Inc., 3 N.J. 472, 70 A.2d 767 (1949); State v. Otis Elevator Co., 12 N.J. 1, 95 A.2d 715 (1952).

68. John S. Westervelt's Sons v. Regency, Inc., *supra* note 67, at 479, 70 A.2d at 771. The opinion in State v. Otis Elevator Co., *supra* note 67, has a more extended discussion of the problem.

69. Chorley, *Procedural Reform in England*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 98, 107 (1949).

70. North Atl. and Gulf S.S. Co. v. United States, 16 F.R.S. 30b.41 Case 2 (S.D.N.Y. 1952), *aff'd*, 209 F.2d 487 (2d Cir. 1954). The case involved S.D. AND E.D.N.Y. RULE 4 with respect to prepayment where depositions are to be taken over 150 miles from the courthouse. Litigation in state courts can also involve interstate depositions. See, *e.g.*, Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

gant seeks to bring nine individuals from Moscow to New York and charge the other side with the costs.[71]

Joiner and Miller argue that taxation of costs should not be within the power of the court because it "involves something more than the orderly dispatch of judicial business." [72] Limited to a choice between legislature and court as repositories of ultimate power, they may be right, but it would be a sorry thing indeed to take from the courts the power to deal with the plethora of problems which come under the heading of costs or to make their power depend on the terms of specific legislative grant.[73] This is an area where rule-making is appropriate, efficient and desirable. In the first instance, the development of this area should be for the courts, but it appears necessary that at some point there be available legislative authority to override the court where its actions reflect a policy fundamentally opposed to what the legislators might consider to be in the significant best interests of the people.

Even simpler problems of categorization invite confusion as courts attempt to delineate the limits of the rule-making power. The time within which an appeal must be taken is a matter which one would certainly expect to be treated as "procedural." Is not this a classic example of a provision "affecting the remedy only"? [74] The problem, however, so bedeviled a New Jersey appellate court that it was forced to conclude that the line between substantive law and adjective law is not the same as that between substantive law and procedural law because the "grant of power to make rules governing the practise and procedure . . . does not include in its scope all adjective law." [75] This statement is a model of clarity compared to an earlier

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71. V. O. Machinoimport v. Clark Equipment Co., 11 F.R.D. 55 (S.D.N.Y. 1951) (plaintiff's request for counsel fees denied). For the subsequent history of the case, see 12 F.R.D. 191 (S.D.N.Y. 1951).

72. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623, 653 (1957). In their short six-line discussion, they add that the taxation of costs "subsumes a fundamental decision as to how much of the expense of litigation the state shall bear. This thus becomes a legislative problem." *Ibid.*

73. See the valuable Note, *Use of Taxable Costs To Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953), which explores the taxation of both costs and expenses as a deterrent to bad faith tactics in litigation and concludes: "It may be assumed that the congested condition of the lower courts is at least in part attributable to this weakness in the law of costs." *Id.* at 93. For a consideration of the significance of inadequate power in the court, in the context of the pre-trial hearing, see 34 IOWA L. REV. 368, 370 (1949). *Cf.* PA. R. CIV. P. 217 (costs on continuance).

74. See text and note at note 68 *supra*. For reference to various other tests see Joiner & Miller, *supra* note 72, at 630, 631.

75. Winberry v. Salisbury, 5 N.J. Super. 30, 34, 68 A.2d 332, 334 (App. Div. 1949), discussed note 36 *supra* where the subsequent history of the case is set forth.

pronouncement in the same opinion that, under a constitutional provision cast in terms of "procedure," it was "not enough" to find that time for appeal was "procedural law as distinguished from substantive law." [76] Taking the opinion as a whole, it seems fair to infer that, in the court's view, there are areas of the law which must be considered "procedural" under any acceptable definition of that term, and which, nonetheless, present basic issues of policy properly left to the legislature.

There is much merit in this counsel of caution, particularly if it be considered in terms of ultimate power and prerogatives. Applying the insight of the New Jersey court to the problems of venue sheds light in a troublesome area. Here, too, one can observe concern for maintaining legislative control over policy decisions. Joiner and Miller suggest that because the county in which "a case should be tried involves something more than the orderly dispatch of judicial business, . . . the people of the state should have the power" to determine where law suits should be initiated.[77] After determining that "initial venue is a matter for legislative determination," the same authorities conclude that rules governing change of venue should be treated differently; these should be for the court. Nor is the suggestion limited to the procedure of change, or to discretion in the individual case. Court rules should be promulgated governing the "grounds" as well as the method of change of venue, and the former may be based on prejudice, convenience, "or any other cause" for these "can involve the orderly dispatch of judicial business and should be subjects of judicial rule making." [78] If there is reason to retain in the legislature power of decision over where within a state relief must be sought and where criminal prosecution must take place, it is of doubtful wisdom to invest the courts with the responsibility of determining when such policies should give way before other considerations ranging from "convenience" to "any other cause." Again this is not to suggest that venue should be considered outside the scope of a court's rule-making power; [79] it is to suggest that dividing responsibility between court and legislature by putting initial venue on one side with change of venue on the other is undesirable. Since the formulation and continual supervision of venue provisions is a detailed, highly technical, yet important, task, it would again be a happier solution for the courts to bear initial responsibility in this area. Placing this responsibility on the courts need not, however, take away from the legislature the power to review, to reassess and to

76. *Ibid.*
77. Joiner & Miller, *supra* note 72, at 649.
78. *Ibid.*
79. *E.g.*, PA. R. CIV. P. 1006, 1042, dealing with venue.

revise where the major premises of the court appear to conflict with policies which the legislators feel should be asserted.

Substantive Considerations in the Interstices

The preceding subsection has dealt with procedural issues which, because they were procedural, should be left in the first instance to judicial regulation, but which, because they may have radical impact on the community, should, in our view, be subject to legislative review. This subsection continues the development of the same theme, with a major point of difference. The need for legislative review in the cases here considered arises from the fact that these procedures are so intimately related with substantive considerations that inherent in them is the potential of frustrating substantive policies. The criminal law can provide illustration.

Criminal procedure, no less than civil procedure, would be encompassed within a general constitutional grant of rule-making authority. So much of the literature on judicial rule-making has focused on problems of the civil side it becomes necessary, at times, to assert afresh the existence of a criminal jurisdiction with such procedural safeguards as trial by jury. There is no doubt that the mode of criminal trial can be safeguarded by express constitutional provision, yet a serious and respected student of constitutional revision in Pennsylvania has suggested that it might be appropriate for the judiciary to regulate procedure thus leaving to the judges of the Supreme Court control over trial by jury, double jeopardy and use of criminal information. "I am sure," writes a former Attorney General of the State of Pennsylvania, "that the rights of the accused would be adequately safeguarded if the Supreme Court were permitted to regulate all procedure by rule, and Sections 6 and 10 [80] could both be safely eliminated." [81] If such action were taken, an unlikely course,[82] it would furnish a further example of procedural policy concerning which the legislature might well be given final voice. Indeed, even the existence of a legislative veto might render its use unnecessary.

Trial by jury does more than illustrate a point already made. It reveals an added facet of the desirability of a legislative role. It is school-boy lore that the substantive law developed in the interstices of procedure. Less familiar, but no less true, is the fact that sub-

80. Reference to PA. CONST. art. I, §6 (Trial by jury) and §10 (Criminal information; twice in jeopardy).

81. Schnader, *Dead Wood in the Pennsylvania Constitution*, 25 TEMP. L.Q. 399, 401 (1952).

82. Immediately preceding this statement Schnader had suggested certain rephrasing as appropriate in the event of constitutional revision. *Ibid.*

stantive law continues to develop today in procedural terms. Removal of the right to trial by jury would probably have significant impact not only on the criminal law in action, but on important phases of the civil law as well, and the call for eliminating the constitutional guarantee of this mode of trial in civil cases is such that it cannot be ignored. There is no need to multiply examples, for instances of substantive considerations secreted in procedural interstices [83] are well known. Yet, to mention a few is to demonstrate that the solution cannot lie in categorizing the interstices, too, as substantive. Consider, *e.g.*, the limits of a directed verdict in negligence cases, the procedural effect of presumptions and the more general field of assigning burdens of proof.[84] It would be wrong to remove these areas from the general rule-making power of the courts. Then, too, there are those procedural safeguards of the criminal law "that have long been considered important bulwarks of individual liberty." [85] Over twenty years ago Sam Bass Warner was fearful that "some of the problems of procedural reform touch too closely the liberties of citizens to be decided in a democracy by any

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83. The reference is to the familiar passage from MAINE, EARLY LAW AND CUSTOM 389 (1901): "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure. . . ."

84. In George Siegler Co. v. Norton, 8 N.J. 374, 86 A.2d 8 (1952), the court upset a jury verdict for plaintiff and ordered judgment entered for defendant, trustee of a railroad, in the face of a statute which provided "in any action against a steam railroad company to recover damages for injury or death occurring at any crossing at which the company has not installed any safety gates, bell or other warning or protective device of the kind usually employed to warn and protect the traveling public and such injuries or death are alleged to be due to the negligence of the company, the plaintiff shall not be nonsuited on the ground of contributory negligence on the part of the person injured or killed, but it shall be left to the jury to determine whether such person was exercising due . . . care. . . ." The court found the statute in conflict with its own rules with respect to the judge's power to withdraw the case from the jury, held the statute to be procedural, operating "within the field of our exclusive rule-making power . . . and therefore is superseded . . . and no longer effective." George Siegler Co. v. Norton, *supra* at 383, 86 A.2d at 12. It appears obvious that the statute, whether or not it be considered procedural, is an attempt to give effect to substantive policies.

UNIFORM RULE OF EVIDENCE 14 sets forth the effect to be given to presumptions and the Comment thereto considers the significance of "the substantive policy on which the presumption is based." See also the discussion in MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 443 (4th ed. 1957), where the burden of going forward and the risk of non-persuasion are also referred to. For the same problem in another area see Padway, *supra* note 62.

Cf. Case, J., dissenting from the position of the majority with respect to rule-making in Winberry v. Salisbury, 5 N.J. 240, 266, 74 A.2d 406, 419 (1950), who notes that the procedural rules are the responsibility of the supreme court and adds: "The justices make the decision; four of them; perhaps three of them; on their own handiwork, a rule that cuts deeply into property and property rights. That decision would be absolutely honest and highly intelligent; but that is not the whole story; it could also be doctrinaire and arbitrary."

85. Warner, *supra* note 46, at 447. State v. Haines, 18 N.J. 550, 115 A.2d 24 (1955), holds that extension of the term of the grand jury is within the scope of the rule-making power of the court. Would a statute requiring corroboration by more than one witness in certain types of cases be procedural?

body not subject to the popular will." [86] Others have been concerned about mortgage moratoria legislation and labor injunctions, both areas where procedural forms have been used to effectuate substantive policies.[87]

In short, here again are areas which should, in the first instance be dealt with by way of judicial rule, although they involve policies best left subject, at some stage, to the will of a forum closer to the people.

The Risk of Improper Categorization

At times the difficulty of delineating substance from procedure becomes so great that a delusively attractive alternative presents itself: abolish the terms altogether, or at least proscribe their use. Riedl, who came to the problem in the course of considering what rules of evidence a court might properly promulgate, found the substance-procedure distinction "impossible" and proposed to abandon it.[88] In our view, the attempt was futile and must, on the whole, remain so. The quest for definition is not the result of happenstance, of historical accident by which an ambiguous term or an infelicitous phrase gained currency with a resultant obfuscation of ideas. The quest stems from the need to define an ill-defined and at times indefinable area of authority, from the need to know with what a court may deal in discharge of its obligation to determine how litigation shall proceed, and beyond what limits it may not trespass. Practice and procedure are familiar terms which, in the large, are accepted as referring to the "how" of litigation.[89] They are neither divinely ordained nor sacrosanct, but to substitute alternatives which come no closer to expressing the limits of that authority [90] is to run the risk of change which has "all the vices of novelty and none of the virtues of lasting improvement." [91] No clearly preferable alternatives have been forthcoming and constitutions continue to use the familiar phrase. Consequently, it remains necessary to deal with its meaning.

Riedl has proposed a test with which to delineate the scope of judicial authority in dealing with the law of evidence by rule. It has

86. Warner, *supra* note 46, at 447. See also opinion of Frankfurter, J. in Malinski v. New York, 324 U.S. 401, 414 (1944): "The history of American Freedom is, in no small measure, the history of procedure."

87. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 253-54 (1951).

88. Riedl, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 601, 604 (1940).

89. Joiner & Miller, *supra* note 72, at 630.

90. Another factor, which appeared to have concerned Riedl, *supra* note 88, is the risk that definitions appropriate to one type of problem shall improperly be carried over to another, quite different problem. See note 66 *supra* for discussion of this point. The problem does not, in this case, appear insurmountable.

91. Clark, *supra* note 53, at 451.

been reformulated, in broader terms, by other writers who have not abandoned the substance-procedure dichotomy.[92] Accordingly, both tests are deserving of study in order (1) to shed further light on the scope of the power conferred by a constitutional grant expressed in terms of practice and procedure; (2) to deal with the important and controversial question of reforming the law of evidence by way of court rule;[93] (3) to determine whether the difficulty in defining the judicial rule-making power, in drawing the line in such manner that it will not be too confining and yet not too encompassing, does not by its very existence argue for vesting in the legislature a power of ultimate review.

For Riedl, the power of a court to promulgate a rule of evidence depends on whether that rule "is a device with which to promote the adequate, simple, prompt, and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of public policy." [94]

The difficulty with Riedl's test is in its major premise. It assumes that the rules, even of evidence, which courts will be concerned about categorizing, fall neatly into one of two pigeon-holes: "declaration of public policy" or "rule to promote the prompt, inexpensive administration of justice." Nothing could be further from the truth, as is demonstrated by the briefest glance at his conclusions concerning specifics. Physical and mental examinations by a physician, certainly proposed as a means of furthering adequate administration of justice,

92. Joiner & Miller, *supra* note 72, at 635.

93. Judge Learned Hand has been quoted as asserting that rule-making power with respect to evidence "has been a very contentious subject." REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE, NEW JERSEY 9 (1956). The New Jersey experience bears this out. In 1954 a committee was appointed to report to the supreme court with respect to revision in this area. They did so in 1955. REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955). In September, 1955, an editorial in N.J.L.J., recognizing the problem posed in the light of the *Winberry* decision, attempted to offer a constructive suggestion. After noting that "this is not the occasion for a philosophical discourse on the distinctions between 'substance' and 'procedure,'" went on to urge that it "would be best to have the Legislature enact the Code as an entirety, and then have the Supreme Court adopt it as a whole." *How Shall the Proposed Code of Evidence Be Adopted?*, 78 N.J.L.J. 316 (1955). A legislative commission appointed thereafter recommended a significantly different set of provisions than that of the supreme court committee. It urged that the legislature retain responsibility for the Evidence "Rules," and invited the supreme court to recommend amendments to the legislature when such became necessary. REPORT OF THE COMMISSION, *supra* at 11-12. See also *An Approach to Evidence Revision*, 81 N.J.L.J. 16 (1958), reporting a further proposal for joint action and stating that "the method of implementation has been the primary obstacle."

The ABA has considered as a "matter for local determination" the question as to whether evidence reform should be achieved by way of statute or court rule. ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 64 (3d ed. 1952). See, generally, Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482 (1940); Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 562-73 (1956).

94. Riedl, *supra* note 88, at 604.

is for Riedl a matter to be determined by the legislature as involving a "General Public Policy".[95] While there can be no doubt that public policy is involved, can it possibly be suggested that this is an issue "having nothing to do with procedure"?

"Expert Testimony" and "Survivor's Testimony against Representatives" are similarly classified as being in the legislative domain,[96] although here, too, there is ample basis for argument that the sole policies involved are those which call for a higher order of administration of justice, a more rational resolution of facts in controversy. When we turn to the problem of privilege we meet the classic example of substantive law in the rules of evidence. Extrinsic policy considerations are said to be operative and paramount. This is indeed true, but it must not be forgotten that the orderly dispatch of litigation, with the maximum information from permitted sources made available to the tribunal, is also a consideration and is, itself, a matter of high policy. The interplay of these factors and the need for balancing them is articulated by Wigmore in his statement of the famous four fundamental conditions for the recognition of a privilege: "The injury that would inure to the relation [being protected] by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." [97] Furthermore, as the persistent and still current controversy over the desirability of a doctor-patient privilege so clearly demonstrates, whenever the existence of a privilege is called into question the issue must be resolved by balancing the advantages to be gained by according it against the resultant loss in efficient administration of justice.[98]

Here, again, it would appear desirable to charge the courts with initial responsibility for reforming the law of evidence by way of rule. The initiative should be assigned to the judiciary and the power invested in the courts. Only in this way are we likely to achieve a simplified, rational set of provisions controlling the trial of an issue of fact. Nor should the courts be obliged to pick and choose among the rules.[99] It would be wrong to say that, in the first instance, privilege shall be for the legislature, but what constitutes a waiver of privilege shall be for the courts. Aristotelian logic might be satisfied by a line so drawn, yet the policies are too interrelated to give promise of functional success.

95. *Id.* at 605.
96. *Ibid.*
97. 8 WIGMORE, EVIDENCE § 2285 (1940).
98. MCCORMICK, EVIDENCE 222-23 (1954).
99. "Since the proposed Code of Evidence was conceived and drafted as an integrated whole, and because procedure and substance are so interwoven," an editorial, 78 N.J.L.J. 316 (1955), urged adoption as a whole.

Specific mention of evidence should be included in the constitutional provision to avoid futile, barren disputation over the authority to deal with evidence as a whole.[100] Anything less is likely to invite indecision or the halfhearted reform which "is worse than none at all." [101] There is sufficient basis for considering the whole of evidence doctrine as procedural, relative to the "how" of litigation rather than to the creation and resolution of substantive rights.[102] But to say this much is not to argue that the courts are to be invested with ultimate power in an area so peculiarly appropriate for final determination by that branch of government which more immediately reflects the sentiment of the community.

What emerges, in short, is that the primary difficulty with the substance vs. procedure dichotomy in the rule-making area is that it forces simultaneous characterization for two very different purposes: first, for the purpose of determining whether the court may act at all and second, for the purpose of determining whether the legislature has competence to review and rescind a promulgated rule. This difficulty is of course not present where the rule-making power is by way of legislative grant. It need not be present where the power is conferred by way of constitutional provision, so long as the constitution proceeds to specify the role reserved for the legislature.

There is a substantial risk in ceding too much to the legislature, particularly if in so doing courts are to abdicate completely from the exercise of any rule-making authority in the ceded area. The point is illustrated in considering a reformulation of the Riedl test by Joiner and Miller. While asserting that their version "approximates" [103] Riedl's, Joiner and Miller propose something very different. The question for them is whether a particular area involves "something more than the orderly dispatch of judicial business." [104] If it does, then it is not an appropriate subject for treatment by court rule. The difficulty with this position is that it excludes too much. Applied rigorously, it would exclude not only such matters as venue and costs, but also such questions as the procedural effect of presumptions. This is not to suggest that the proponents of the test would so apply it. Indeed, they recognize that theirs is not a formulation which should be

100. See the New Jersey experience, note 93 *supra*.

101. Clark, *supra* note 53, at 451.

102. Clapp, *supra* note 93, marshals an impressive array of authority and concludes that the Uniform Rules of Evidence are entirely procedural except for a few particulars. *Id.* at 571. Of the two exceptions which he mentions, one concerns payment of impartial medical experts, a fiscal matter, and the other a privilege not to speak to police officers. *Id.* at 571 n.119.

103. Joiner & Miller, *supra* note 72, at 635.

104. *Id.* at 649.

expected to answer all questions of rule-making authority.[105] The point, however, is deserving of emphasis: if it would be wrong to cut off the legislature from areas which are legitimate subjects of its concern, it would be unfortunate in equal, if not in greater measure, to stultify the grant of rule-making authority by keeping the court from utilizing it in areas in which it could be of service.

It is important to recognize that courts themselves may be prone to define their own authority too narrowly. As Kaplan and Greene have pointed out, the absence of any legislative control over the judiciary may result in a niggardly view by the court of its own powers, for to assert the right to make rules is, in such a case, to assert the right exclusively and finally.[106] It is certainly true, on the other hand, that a court immunized from any review of its own determinations as to what is within its rule-making power as well as from any veto over what it chooses to promulgate, may prove too prone to assume authority.[107] Neither alternative is a happy prospect. The possibility of each is further reason to provide for residual powers in the legislature.

New Jersey's National Trend

The only state to assert for its Supreme Court uncontrolled and uncontrollable rule-making power[108] is New Jersey.[109] Wigmore, Pound and Vanderbilt, an imposing triumvirate, can be credited with placing that jurisdiction in the class of those which grant rule-making power to the supreme court without the possibility of legislative veto. To point out that membership in this class is presently limited to one state is not to deny the influence of New Jersey's experience. On the contrary, there is reason to believe that an influence has been exerted. New Jersey's story is worth retelling.

The major battle ground on which are resolved differences concerning the allocation of power between the coordinate branches of government is the constitutional convention, or its analogue. Infelicitous drafting may invite further conflict on another day in another

105. *Id.* at 629.

106. Kaplan & Greene, *supra* note 87, at 253 n.80.

107. *Id.* at 253.

108. The New Jersey Legislative Committee noted: "When our Supreme Court assembles to make rules, it sits not as a court of justice, but as a law-making body. . . . Indeed this special law-making assembly has advantages that the other does not possess; for its acts are not subject to veto; and the seven men who compose it can don their judicial robes and render judgment on the extent of their own powers and the validity of their own acts." Report of the Commission, *supra* note 93, at 10. See also statement of Case, J., note 84 *supra*.

109. See note 36 *supra*.

forum,[110] but even without the express invitation of ambiguity or lacuna no victory gained in the formulation of the instrument can be considered safe until finalized by judicial construction in the course of litigation. Nor can court opinion be considered the very last word so long as dissent invites reappraisal and the criticism of the commentators invites amendment. New Jersey has been involved with all three phases. We turn, first, to the Constitutional Convention of 1947.

A preliminary draft of the provision in question, proposed by the Committee on the Judiciary and circulated by it, read: "The Supreme Court shall, subject to law, make rules governing the administration and the practice and procedure in all the courts in the State." [111] Arthur T. Vanderbilt attempted to persuade the Committee to change the draft in favor of a grant of rule-making power unfettered by threat of legislative reversal. He viewed the words "subject to law" as imposing legislative control on the court and urged that they be deleted.[112] In the course of his argument to the Committee, Vanderbilt asserted that "The trend throughout the United States has been to confide the rule-making power to the highest court and to hold that court responsible for results." [113]

The words "subject to law" were not deleted, although their position in the paragraph was altered so that it read: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." [114] Three years later Arthur Vanderbilt, now Chief Justice of New Jersey, took occasion to interpret the key phrase in the leading case of *Winberry v. Salisbury*.[115] Speaking for the court,

110. In Winberry v. Salisbury, 5 N.J. 240, 243, 74 A.2d 406, 408 (1950), the majority opinion found the governing provision to be "not only ambiguous, but elliptical." Kaplan & Greene, *supra* note 87, at 246, suggest that the New Jersey provision "is not a model of clear drafting." See also the problems invited by the language of the Alaska constitution, discussed *infra* note 162.

111. *Tentative Draft of Judicial Article, § II, par. 3*, 2 N.J. CONST. CONVENTION OF 1947, at 1167 (1951).

112. *Letter of Arthur T. Vanderbilt*, 4 *id.* at 729.

113. *Ibid.*

114. N.J. CONST. art. VI, § 2, par. 3. The Judiciary Committee in its report, 2 N.J. CONST. CONVENTION OF 1947, at 1180, 1190 (1951), and by the statement of its vice-chairman on the floor of the convention in the course of presenting the article made it abundantly clear that the legislature was to "have power . . . to alter those rules of practice [promulgated by the court] analogous to the power now possessed by the Congress of the United States." 1 *id.* at 146-47. For discussion of the relevant material and evaluation of its treatment by the majority in *Winberry v. Salisbury*, see Kaplan & Greene, *supra* note 87, at 241-45.

115. 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950). Winberry brought suit to expunge an alleged libel against himself from the records of a grand jury. Judgment was entered for defendant and plaintiff appealed within the period provided by statute, but after the forty-five days allowed by rule of the supreme court. The appellate division dismissed the appeal and the supreme court affirmed.

Vanderbilt once again asserted the same trend,[116] this time as part of the argument devoted to demonstrating [117] that "subject to law" meant subject to substantive law, that practice and procedure had been placed in the hands of the court "both initially and finally," [118] that the legislature had been stripped of its former power to override.

The *Winberry* case has been debated extensively.[119] A particularly valuable article by Kaplan and Greene analyzes the majority opinion carefully not only in terms of the history of the crucial phrase and its meaning in context, but also in terms of the policy factors against which the result must be measured.[120] Treating gently the matter of trends, Kaplan and Greene suggest that " 'Trends,' like beauty, lie mostly in the eye of the beholder; but for ourselves, we find no observable groundswell for the idea that the legislature should be barred from final competence to regulate court procedure. Rather we find a growing recognition of the soundness of the policy of vesting comprehensive rule-making power in the courts, with accountability in the last analysis to the legislature." [121] Certainly, this represents accurately the history of rule-making

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Case, J. concurred on the ground that the "initial authority to make rules lay with the court," apparently relying on the fact that the statute in question had antedated the 1947 constitution. *Id.* at 255, 74 A.2d at 414, Heher, J. dissented without opinion.

116. 5 N.J. at 253, 74 A.2d at 413.

117. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 29 (1952), refers to the interpretation of "subject to law" as a holding. Heckel, *supra* note 55, at 27 considers this dictum, adding "although it has been stated that our judiciary will not render advisory opinions, the decision of the Supreme Court in *Winberry v. Salisbury* is actually one." *Ibid.* Kaplan & Greene, *supra* note 87, at 239, say that the answer to the meaning of the phrase "subject to law" was given "in considered dictum if not in holding."

The source of the dictum v. holding controversy is to be found in the fact that the statute in question antedated the 1947 constitution and the supreme court had already held in John S. Westervelt's Sons v. Regency, 3 N.J. 472, 70 A.2d 767 (1950) (attorney's fees), that the rules promulgated on the effective date of the 1947 constitution "superseded the preexisting law, statutory or otherwise." John S. Westervelt's Sons v. Regency, *supra* at 478, 70 A.2d at 771.

118. 5 N.J. at 266, 74 A.2d at 419.

119. Kaplan & Greene, *supra* note 87; Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952); Heckel, *Constitutional Law, Survey of the Law of New Jersey 1950-1951*, 6 RUTGERS L. REV. 27, 29-30 (1951); 99 U. PA. L. REV. 418 (1950); 36 IOWA L. REV. 569 (1951); 24 TEMP. L.Q. 477 (1951); 31 B.U.L. REV. 97 (1951).

Since *Winberry* the New Jersey courts have had a number of occasions to hold statutes superseded by rule of court, simply reiterating Vanderbilt's view as settled law and evidencing so little concern with the date of the statute as to fail to have it appear in the opinion. Senst v. Senst, 14 N.J. Super. 317, 82 A.2d 204 (App. Div. 1951); George Siegler Co. v. Norton, 8 N.J. 374, 86 A.2d 8 (1952); State v. Ahrens, 25 N.J. Super. 201 95 A.2d 755 (App. Div. 1953). In Columbia Lumber & Millwork Co. v. DeStefano, 12 N.J. 117, 95 A.2d 914 (1953), Brennan, J., writing for the New Jersey Supreme Court, applied the rule of *Winberry* without further analysis to hold a 1949 statute of no effect to the extent that it conflicted with a 1948 court rule. For other New Jersey cases see note 36 *supra*.

120. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951).

121. *Id.* at 251.

in this country over the past quarter century and the current state of authorities.[123] It is true that there is perceptible movement in the direction of giving courts power without accountability in the area of "administration," a subject which will be separately treated.[128] It is also true that Wigmore in a famous editorial,[124] variously characterized,[125] and Pound in writings cited in *Winberry*[126] as well as in a reply to Kaplan and Greene in defense of *Winberry*,[127] support the desirability of Vanderbilt's conclusion. It is necessary to consider the major points of the majority and concurring opinions.

In evaluating alternative schemes of allocating power between the courts and the legislature as a problem in constitutional revision, we may put to one side those arguments which turn on the history of the language in New Jersey's governing provision as well as other factors present in, but limited in significance to, the particular case. To the extent that the particular words chosen by the draftsman have been held to imply a particular result, we may be interested in selecting them or avoiding them in the course of future drafting, but that they can constitute no aid in resolving the problem of allocation viewed as a normative question, is clear. Also putting to one side arguments in favor of rule-making generally and those strictly in rebuttal, two affirmative points emerge from the majority position. First is the argument that since the judges of the Supreme Court are charged with the rule-making obligation, they are not merely authorized to make rules but are mandated to do so,[128] and they alone should bear the responsibility so that they may be held accountable.[129] Second is the argument that the rule-making power must be viewed as continuous, that it would be intolerable and inconsisent with the general plan of the New Jersey Constitution for the legislature to remove from the competence of the court particular areas of procedure, a result which must follow from legislative intervention since no mechanism is available, short of legislative repeal of the overriding statute, to reintroduce into the ken of the court an area once

122. See note 36 *supra*; INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS *passim* (1955).

123. See text beginning at note 158 *infra*.

124. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

125. Kaplan & Greene, *supra* note 120, at 251, after describing the title of Wigmore's editorial as "temerarious," suggest that his "omnibus argument is better taken as the *jeu d'esprit* of a master than as a serious constitutional analysis." Pound, *supra* note 117, at 37, takes issue with this characterization and terms Wigmore's article a "serious and well-grounded proposition." *Cf.* Joiner & Miller, *supra* note 72, at 629, who conclude that "theory must give way to reality."

126. 5 N.J. at 254-55, 74 A.2d at 413.

127. Pound, *supra* note 117.

128. See note 37 *supra*.

129. 5 N.J. at 253, 74 A.2d at 413.

removed legislatively. The suggestion that the legislature might act to override the court, with the court remaining competent by further rule to override the legislature, a situation which may be developing in Missouri,[130] is rejected as intolerable.[131]

There is merit to both of these points made by the court, but it appears to us that they need not call for what Mr. Justice Case has characterized as placing practice and procedure "within the court's unresponsible creation and control." [132] If the legislature is to be accorded power to act, certainly there ought to be constitutional provision for the reacquistion of initiative by the court. Similarly, the court can, in a very real sense, be held accountable and be in fact responsible for procedural law if the conditions of legislative intervention are such as to discourage tinkering with detail and meddling with anything less than compelling matters of policy. Where the legislature has felt obligated to interpose its judgment on a question which rises to this level of significance, it should be the responsibility of the court to continue to fashion a procedural system which operates efficiently consistent with such policy. To ask this much is to do no more than to maintain a proper sense of perspective, distinguishing between techniques and basic policy considerations. How this may be accomplished is considered below.[133]

Mr. Justice Case wrote a concurring opinion in *Winberry* which, for purposes of the problem here being considered, was a dissent. He makes a telling point which has validity beyond the confines of the particular litigation. "Constitutions are not made," he suggests, "and ought not to be construed, upon the hypothesis that men presently or prospectively in office will continue indefinitely to function in their particular capacities." [134] In short, a sense of historical perspective is imperative. After all, it is a constitution which we are attempting to fashion. Certainly it is true that the history of procedural reform in this century has been, primarily, a history of rule-making by courts.

130. See note 36, *supra*. Compare S.D. Code § 32.0902 (1939) which provides in part: "Nothing in this section shall abridge any power the Legislature may have to enact, amend, or repeal statutes or rules of court relating to pleading, practice, or procedure, nor shall anything herein abridge the power of the court hereafter to promulgate further, or to amend, or repeal any such statute the Legislature may have enacted, amended, or repealed, or to make such new or additional rules or amendments of its existing rules as it may elect."

131. 5 N.J. at 244, 74 A.2d at 408.

132. *Id.* at 266, 74 A.2d at 419.

133. See text at note 180 *infra*.

134. 5 N.J. at 264, 74 A.2d at 418. See also the conclusion in 99 U. Pa. L. Rev. 418, 421 (1950): "[Y]et, case law outlives those who make it, and conceivably future supreme courts in New Jersey will be as conservative as the instant one is progressive. This would result, under the present interpretation of the constitution, in a procedural moratorium immunized to the will of the people."

But this has not always been the case. The major advance in this country during the nineteenth century was by way of legislative enactment, beginning with David Dudley Field's code which, after its adoption in New York, literally swept over the country.[135] There is no need here to rehearse the difficulties in which code pleading and code practice soon became embroiled; the history is familiar enough.[136] The point to be made is that there have been times when reform through the courts was unthinkable, when stodginess and conservatism ruled the bench.[137] These may be unlikely to return, but it would be wrong to foreclose the possibility of legislative action should the unlikely eventuate. The opinion in *Winberry* may be viewed as a reaction to an obstreperous legislature which three short years after the adoption of the new constitution in New Jersey, was already threatening to render judicial rule-making impotent.[138] The risk of the obstreperous is inherent in democratic living; it may be minimized by conditioning the use of power. It should not serve as sufficient reason for a skewed view of the proper vesting of ultimate controls.

The Domain of Exclusive Judicial Power

Grant the necessity for concurrent jurisdiction in the field of procedure, immediately another problem presents itself. Should there not be some realm of judicial administration entirely free from legislative supervision? Or shall the legislature be permitted to dictate to the

135. Clark, *Code Pleading and Practice Today*, in David Dudley Field Centenary Essays 55, 58 (1949); Mitchell, *The Federal Rules of Civil Procedure*, in David Dudley Field Centenary Essays 73 (1949).

136. By 1878 New York's relatively simple Field Code had grown into a grotesque giant which Field himself condemned as a "monstrosity." Quoted in Mitchell, *supra* note 135, at 74. By 1880 it had close to 3500 sections, a few hundred shy of ten-fold increase in a generation. *Ibid.* What followed was a "history of code tinkering." Clark, *supra* note 135, at 61.

137. Speaking of Field, Clark writes: "Presumably he never thought of action through the courts; there was no reason why he should in the light of the habits of the day." Clark, *supra* note 135, at 58. And, more persuasively, "had he [thought of working through the courts], he would have realized how hopeless was then this approach." *Ibid.* See also the statement quoted in note 134 *supra*.

It is interesting to note that for nearly a year after Congress had passed the 1934 Act authorizing the Supreme Court to promulgate rules of civil procedure the Court took no action "and seemed oblivious to the charge committed to it." Clark, *Two Decades of the Federal Civil Rules*, 58 Colum. L. Rev. 435, 438 (1958). Indeed, as one commentator observed, "that the court should accept its duty passively would have been the traditional thing in view of the experience in several states." *Editorial, Dramatic Pronouncement by Chief Justice Hughes*, 19 J. Am. Jud. Soc'y 3 (1935). For the Michigan experience of "sporadic, piecemeal, and incomplete" exercise of the rule-making function by the court see note 36 *supra*. Examples could be multiplied, not excluding New Jersey. See Kaplan & Greene, *supra* note 120, at 252.

138. For discussion of some of the legislative conflicts, as well as an attempt to override *Winberry* by constitutional amendment see *id.* at 251-53. See also note 180 *infra*. For more recent conflict see discussion of the New Jersey experience with respect to evidence, *supra* note 93.

courts every detail of their internal regimen: command appellate courts to issue written opinions in every case,[139] declare within what time cases shall be heard,[140] deny to the court the power to issue its mandate until a prescribed period of time after judgment shall have elapsed?[141] There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*.

It is significant that even under constitutions which make no express grant of rule-making power to the judiciary and which have been held to sanction extensive and overruling legislative control of court practice and procedure, an area of strict judical immunity has been consistently recognized.[142] Throughout a long history dominated by what Pound has called "the idea of legislative omnicompetence,"[143] court after court has nevertheless declared invalid under the several constitutions legislative enactments said to pass "the limit which separates the legislative from the judicial power"[144] and to constitute a "palpable encroachment upon the independence" of the judiciary.[145] The rationale of these cases is demonstrated by the opinion in *Burton v. Mayer*,[146] a case in which the Kentucky Court of Appeals refused to be bound by a statute which purported to deny it the right to issue its mandate immediately in a case already decided and where delay might well render the judgment futile. Said the court: "The grant of judicial power to the courts carries with it, as a necessary incident, the right to make that power effective in the administration of justice under the Constitution."[147] This theme is expanded upon in other cases which emphasize the fundamental scheme of separation of powers and the corollary proposition that judges may not be inhibited from judging, from the effective resolution of justiciable controversies.[148]

139. Houston v. Williams, 13 Cal. 24 (1859); Vaughan v. Harp, 49 Ark. 160, 4 S.W. 751 (1887).

140. Schario v. State, 105 Ohio St. 535, 138 N.E. 63 (1922); Atchison T. & S.F. Ry. Co. v. Long, 122 Okla. 86, 251 Pac. 486 (1926).

141. Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938).

142. COOLEY, CONSTITUTIONAL LIMITATIONS 175-94, 356 (8th ed. 1927), and cases cited therein. Cases also collected in Annot., 110 A.L.R. 22, 33-38 (1937).

143. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 34 (1952).

144. United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872).

145. Houston v. Williams, 13 Cal. 24, 25 (1859).

146. 274 Ky. 263, 118 S.W.2d 547 (1938).

147. *Id.* at 266, 118 S.W.2d at 549.

148. State *ex rel.* Watson v. Merialdo, 70 Nev. 322, 329, 268 P.2d 922 (1954), held unconstitutional a statute which conditioned the payment of a judge's salary on the filing of an affidavit by the judge that no matter submitted to him within ninety days remained undecided. The court found it of moment that neither forfeiture

Similarly, in *Atchison T. & S.F. Ry. v. Long*[149] the validity of a statute which provided that in a certain type of tax assessment proceedings the district court should try the cause within ten days after answer was in question. Noting that the effect of such a provision would be to deny to the courts discretion to grant a continuance, whatever the exigencies confronting a particular litigant, and thus perhaps prevent judicial adjudication of a controversy otherwise within the competence of the court, the Supreme Court of Oklahoma held the statute invalid. An act which "in any manner limits or restricts the judicial arm of the government in properly exercising its discretion in discharging the duties imposed upon it by the Constitution . . . is void and must fall. . . . No one will deny that the legislative arm of the government has the power to alter and regulate the procedure in both law and equity matters, but for it to attempt to compel the courts to give a hearing to a particular litigant at a particular time, to the exclusion of others who may have an equal claim upon its attention, strikes a blow at the very foundation of constitutional government."[150] We do not pause to evaluate the results reached in particular cases. What the holdings do suggest is that there is a third realm of judicial activity, neither substantive nor adjective law, a realm of "proceedings

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nor diminution was involved; fighting delay in judging with delay in paying was coercive and improper as legislative interference with the judiciary. Similarly, State *ex rel.* Kostas v. Johnson, 224 Ind. 540, 69 N.E.2d 592 (1946), held invalid a legislative attempt to deal with the law's delay, this time by the device of denying a judge jurisdiction over any cause which remained undecided for ninety days and in which an appropriate petition shall have been filed by one of the parties. The opinion notes that legislation "forbidding" courts to hold any issue for longer than a specified period is normally construed as "directory only" and, having no mandatory effect, is constitutionally unobjectionable. Both the *Merialdo* and the *Johnson* cases reason from the premise of constitutional separation of powers. See also cases cited notes 153-55 *infra* and the oft-cited discussion in ROTTSCHAEFER, CONSTITUTIONAL LAW §§ 48-49 (1939).

Particularly striking is State *ex rel.* Bushman v. Vandenberg, 203 Ore. 326, 280 P.2d 344 (1955), in which the court held unconstitutional a statute providing for automatic disqualification of a judge upon application of a party. Finding that, under the terms of the statute, disqualification was at the will of a litigant based on "good cause, bad cause, or no cause at all," *id.* at 337, 280 P.2d at 348, the court held the legislative enactment void as contravening "the principle of the separation of powers." *Id.* at 341, 280 P.2d at 350. See also McConnell v. State, 227 Ark. 988, 302 S.W.2d 805 (1957), which held void a rather extreme statute dealing with continuances.

Compare the reasoning in two cases upholding judicial power over appointment of personnel: *In re* Appointment of Clerk of Court of Appeals, 297 S.W.2d 764 (Ky. 1957) and Noble County Council v. State *ex rel.* Fifer, 234 Ind. 172, 125 N.E.2d 709 (1955). In the former case the court noted with concern a public announcement of the Commissioner of Finance which, "according to the press," expressed an intention of withholding payment of the salary of the clerk of court until directed to do so by court order, found it had authority to "make ex parte orders without formally instituting an action to secure the desired relief," promptly did so.

149. 122 Okla. 86, 251 Pac. 486 (1926).

150. *Id.* at 88-89, 251 Pac. at 488-89.

which are so vital to the efficient functioning of a court as to be beyond legislative power." [151] This is the area of minimum functional integrity of the courts, "what is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court." [152] Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge [153] or how he shall comport himself in judging [154] or which seeks to surround the act of judging with hampering conditions [155] clearly offends the constitutional scheme of the separation of powers and will be held invalid.

We need not survey the total range of subjects held to fall within this field, nor do we deal with specialized problems such as admission to the practice of the law and the discipline of persons so admitted, prob-

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151. *Ex parte* Foshee, 246 Ala. 604, 607, 21 So. 2d 827, 829 (1945). The statute in this case was not held invalid.

152. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 636 (1935). *Cf.* the test applied in *Ex parte* Shenck, 65 N.C. 353, 368 (1871). Holding valid a statute regulating the disbarment of attorneys, the court writes: "The recent act above referred to does not take away any of the inherent powers of the courts, which are absolutely essential in the administration of justice, and is not such an encroachment upon the rights of the judicial department of the government as to warrant us in declaring it unconstitutional and void." And see Paul, *The Rule-Making Power of the Courts*, 1 WASH. L. REV. 223, 231 (1926).

153. It has been held that a statute declaring a particular type of document conclusive evidence of the facts to which it attests is void as "an intrusion into the functions of the judicial department." Gordon v. Lowry, 116 Neb. 359, 217 N.W. 610, 611 (1928); Southern Cotton Oil Co. v. Raines, 171 Ga. 154, 155 S.E. 484 (1930); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); *accord*, State v. Atkinson, 271 Mo. 28, 195 S.W. 741 (1917). The legislature may not prescribe a period of time after decision within which a mandate may not issue. Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938). It has also been held that the legislation may not prohibit the directing of a verdict, Thoe v. Chicago, M. & S.P. Ry. Co., 181 Wis. 456, 195 N.W. 407 (1923), nor prescribe by law that it shall be the duty of the court in any case of doubt as to the construction of a statute creating a lien, to so construe it as to give the person claiming the lien the full amount of his claim. Meyer v. Berlandi, 39 Minn. 438, 40 N.W. 513 (1888). See opinion of Justice Fairfield in Burt v. Williams, 24 Ark. 91, 94 (1863): "A legislative act is an annunciation by the legislative authority that certain results shall follow particular actions or conditions; but the ascertainment of the act or condition and the application of the consequences belong to the courts." Note that our concern is with the rationale of these cases rather than with the question of whether the correct result has been reached in applying the general principles to individual situations.

154. Some courts have held that the legislature may not by statute require a court to write syllabi to its opinions, *In re* Griffiths, 118 Ind. 83, 20 N.E. 513 (1889); nor compel the court to write opinions in every case, Houston v. Williams, 13 Cal. 24 (1859); Vaughan v. Harp, 49 Ark. 160, 4 S.W. 751 (1887); Ocampo v. Cabafigis, 15 Phil. 626 (1910).

155. The legislature may not fix a time within which a court must hear a cause, Schario v. State, 105 Ohio St. 535, 138 N.E. 63 (1922); Atchison, T. & S.F. Ry. Co. v. Long, 122 Okla. 86, 251 Pac. 486 (1926), nor appoint nor provide for the appointment of assistants to the justices of the supreme court, State *ex rel.* Hovey v. Noble, 118 Ind. 350, 21 N.E. 244 (1889), nor prescribe for the court what shall constitute a sufficient brief on appeal, Solimito v. State, 188 Ind. 170, 122 N.E. 578 (1919); Epstein v. State, 190 Ind. 693, 127 N.E. 441, 128 N.E. 353 (1920). Also see authorities cited note 148 *supra*.

lems which may deserve independent constitutional treatment.[156] We recognize that the outer boundaries of this sphere of total judicial autonomy have been difficult to locate with precision.[157] Suffice that such a place of sanctuary exists and that whenever courts have felt themselves too tightly pressed by legislative regulation they have found in the doctrine of judicial independence a large reservoir of integral supremacy. A constitutional draft which expressly reserves ultimate authority over procedure to the legislature need not be feared as sanctioning legislative invasion of this last judicial stronghold. It is beyond procedure. So long as a constitution maintains the fundamental separation of powers this area of functional independence of the judiciary will be preserved in the very grant of the judicial power. And within it the courts remain the vigilant watchdogs of their own freedom.

Administration

Several of the more recently drafted constitutions, however, go further and expressly set aside another large terrain as the exclusive domain of the courts. The New Jersey Constitution of 1947 gives to the supreme court power to "make rules governing the administration of all courts and, subject to law, the practice and procedure in all such courts." [158] Whatever may have been the intent of the drafters concerning supremacy in the field of procedure, it is evident that the grant of power over "administration" is complete and unqualified.[159] The Puerto Rico Constitution,[160] the proposed Illinois Judicial Amendment,[161] and perhaps the Alaskan Constitution [162] grant to their respective highest courts a similar authority: power without review in the area of "administration." What these grants represent, apparently, is constitutional recognition of the modern unified court system. They comprehend a power over matters which are not "procedural" in the

156. For varying provisions see N.J. Const. art. VI, § 2, ¶ 3 (exclusive power in the supreme court over admission to the practice of law and the discipline of persons admitted); Phil. Const. art. VIII, § 13 (concurrent jurisdiction with legislative supremacy in the matter of admission to the practice of law).

157. 1 Cooley, Constitutional Limitations 179 (8th ed. 1927).

158. N.J. Const. art. VI, § 2, ¶ 3.

159. See 5 N.J. at 256-57, 74 A.2d at 414-15 (Case, J. concurring); *Committee on the Judiciary Report*, 2 New Jersey Constitutional Convention of 1947, at 1180 (1951).

160. P.R. Const. art. V, § 7.

161. *Ill. Const. Proposed Amendment art. VI, § 2*, Ill. Ann. Stat. (Supp. 1957).

162. Alaska Const. art. IV, §§ 15, 16. Note the ambiguity in § 15 as to whether all court-made rules, or only those governing practice and procedure, are subject to legislative overrule. Other constitutions containing no such sweeping grant of general "administrative" power specifically provide for the assignment of judges in all courts. Cal. Const. art. VI, § 1a (1926) (Judicial Council); Md. Const. art. IV, § 18A (1943) (Chief Justice as "administrative head of the judicial system" subject to rules of the Court of Appeals); Mo. Const. art. V, § 6; see N.J. Const. art. VI, § 7, ¶¶ 1, 2.

sense that the latter treat of the procedures involved in bringing a particular case to adjudication, but which are concerned rather with the internal organization of large and complex systems of courts. They establish a scheme whereby the chief justice of a state, or the highest court of the state, is responsible for the efficient, businesslike operations of all state courts, and to this end they vest in that high authority powers which include the assignment of particular judges to specialized duties, the temporary assignment of judges to courts other than their own to equalize work-loads, the assignment of one judge's cases to another judge to equalize dockets.[163] What it is important to investigate at this point is whether this area of "administration" is rather in the nature of the inviolable sphere of necessary judicial autonomy discussed above or whether it more nearly shares with the area of "procedure" qualities which make desirable a reservation of ultimate legislative authority within it.

What then is "administrative" power? The apparent clarity of the term "administration" is deceptive. How far does it extend? What does it exclude? While the general area of its import is apparent, it is a concept almost infinitely extensile. A monograph published by the Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention of 1947 bears the title: "Judicial Administration." After discussing "Rules of Practice and Procedure", "A Business Office for the Courts", "Judicial Control over Non-Judicial Officers Concerned with the Administration of Justice", and "The Judicial Council", its author concludes, "a discussion of judicial administration is not complete without consideration of the rules of grand and petit juries, the prosecutor's office, the desirability of public defenders, probation departments, specialized courts to deal with small causes, domestic relations, juvenile offenders and the like, the coordination of the work of courts and other governmental agencies, as for example police courts and the Commissioner of Motor Vehicles, and numerous other topics. Few, if any of these subjects are proper for treatment in a Constitution. The salient changes in judicial administration suitable and eligible for constitutional consideration are the items which have been dealt with under the main headings, to which this report is accordingly confined." [164] It will be noted that although

163. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 34-35 (1949).

164. Schnitzer, *Judicial Administration*, in N.J. GOVERNOR'S COMM. ON PREPARATORY RESEARCH FOR THE NEW JERSEY CONSTITUTIONAL CONVENTION, MONOGRAPHS, F VII 10-11 (1947). For the range of subject matters sometimes included in various uses of the word "administration" see also ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 22, 28-29 (3d ed. 1952); Burton, *"Judging Is Also Administration": An Appreciation of Constructive Leadership*, 33 A.B.A.J. 1099 (1947).

the report is so confined, the constitutional grant in terms is in no way similarly confined. "Administration of the courts" cannot mean merely the power of assignment of judges, for this power is specifically vested in the Chief Justice by another section of the Judicial Article.[165] It cannot mean merely the power to maintain a general business office for the courts; this too is specifically provided elsewhere.[166] But the problem is not merely one of the word. At its narrowest plausible definition "administration" remains a field so wide that to entrust it to the exclusive power of the judiciary is palpably unwise. The operative General Rules of Administration of the Supreme Court of New Jersey provide that the Supreme Court, the Superior Court, the County Courts and the District Courts shall sit from 10 A.M. to 1 P.M. and from 2 P.M. to 4 P.M.[167] They declare upon what days the court shall sit,[168] and establish the period of summer vacation of all courts.[169] If it should become essential in the public interest that a court be available in the evening, should not the legislature have power to make this change? If the judicially favored schedule of long summer recess should prove unsatisfactory to the public needs, should not the legislature have power to override judicial recalcitrance and provide for a summer-sitting court? It is not suggested that the legislature should, or would, accept an active supervisory role in court affairs, require weekly reports from judges, declare that upon this particular day courts shall remain open until five. Such detailed regulation might well be rejected by the courts as an encroachment upon judicial independence, an invasion of the realm of functional integrity of the courts.[170] Clearly a balance must be struck; and the courts will not hesitate to invoke the separation of powers doctrine to maintain their own living space. But independence requires no such immunity as would remove from the legislature all power to adjust the state courts to the important needs of the people of the state. The New Jersey General Rules of Administration now provide that motions, conferences and pretrial hearings shall be held in open court,[171] that judge's chambers shall, if possible, be in the courthouses,[172] that the clerks of

165. N.J. CONST. art. VI, § 7, ¶ 2.

166. N.J. CONST. art. VI, § 7, ¶ 1.

167. N.J. RULE 1:28-1.

168. N.J. RULE 1:28-2.

169. N.J. RULE 1:28-4.

170. We view as insubstantial the possible argument that an affirmative grant of legislative supremacy over "administration" operates to override the grant of judicial power which assures the courts an absolute independence within the realm necessary to their judicial functioning. In the ultimate, it will be for the courts to establish the boundaries of their necessary, integral immunity.

171. N.J. RULE 1:28-6.

172. N.J. RULE 1:28-7.

court shall, in all cases which have been pending for six months without proceedings, give notice of a motion by the court to dismiss for want of prosecution.[173] These rules are no doubt excellent. But they imply that the court might, with equal freedom from legislative review, order that all such hearings be heard in chambers, that the judge's chambers shall not be in the courthouse, that a court motion for dismissal as inactive shall be noticed after six weeks. At the very least it must be admitted that somewhere within the expansive confines of "administration" there lie problems whose solutions require decisions of significant public policy. Such decisions, although they are to be made in the first instance by the court, should certainly be subject to ultimate review by the politically responsible members of the legislature.[174]

This is not to argue that the courts should have no power of self-administration. On the contrary, the astonishing record of judicial reform in New Jersey over the past ten years [175] gives persuasive evidence of the immense benefits to be gained from a unified, centralized and streamlined court system. The application to the judicial arm of "principles of business management" [176] has paid rich dividends of rapid and efficient justice. It is as necessary to an effective system of courts that it control its own administration as that it control its own practice and procedure.[177] We must not deprive it of that power. But as with practice and procedure, we are not forced to elect between the equally undesirable alternatives of absolute judicial control and absolute legislative control. There is a middle scheme that holds out all of the advantages of judicial autonomy while severely minimizing its collateral dangers. This is the scheme of concurrent jurisdiction: granting to the courts full authority of initiative self-regulation, reserving to the legislature an ultimate voice to curb abuse.[178] In fact, just as in "pro-

173. N.J. RULE 1:30-3.

174. Supreme court judges in New Jersey are appointed for an initial seven year term and upon reappointment hold their offices during good behavior. N.J. CONST. art. VI, § 6, ¶¶ 1, 3. In Pennsylvania judges of the supreme court serve for twenty-one years and are ineligible for reelection. PA. CONST. art. V, § 2.

175. Brennan, *After Eight Years: New Jersey Judicial Reform*, 43 A.B.A.J. 409 (1957); Karcher, *New Jersey Streamlines Her Courts*, 40 A.B.A.J. 759 (1954); Vanderbilt, *Our New Judicial Establishment; The Record of the First Year*, 4 RUTGERS L. REV. 353 (1950); Vanderbilt, *Record of the New Jersey Courts in the Sixth Year*, 9 RUTGERS L. REV. 489 (1955).

176. Brennan, *Does Business Have a Role in Improving Judicial Administration?* 28 PA. B.A.Q. 238 (1957).

177. *Section of Judicial Administration, Committee on Judicial Administration, Report*, 63 A.B.A. REP. 530, 532 (1938). Whether a supreme court charged with responsibility for the administration of the judicial system should have the power to fix the number of judges is an interesting question which need not be resolved here.

178. 1 STORY, CONSTITUTION 393 (5th ed. 1891): "But when we speak of a separation of the three great departments of government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and

cedure," the very difficulty of definition and categorization of the "administrative" realm argues for a scheme of concurrent jurisdiction. Where shadowy boundaries are used to delineate spheres of exclusive power, litigation is common, mistakes inevitable and irrevocable. Courts may overleap themselves without recall and make final determinations of policy best left to the legislature. Or, from fear of just such overleap, the courts may altogether decline to act in questionable border areas. But where power is concurrent, the difficulty of drawing boundary lines becomes less disastrous. If "procedure" and "administration" are both to be spheres wherein the court and legislature have a common authority, no distinction need be made between them. And even the boundary which separates this concurrent realm from the realm of "substance" becomes less hazardous where the only difference in terrain is that on one side the terms under which legislative power is to be available are somewhat different than the terms which surround the same power on the other side. So long as legislative review is possible within the area of court power, the court will be less hesitant in giving wide and effective sweep to its own power. And should it err, the legislature holds a higher power of redress.

But the mere words *concurrent jurisdiction* are no talismanic phrase to solve all problems. A final, fundamental question remains. Ultimate power by its exercise becomes immediate. "Power . . . is of an encroaching nature." [179] How are we to insure the maintenance of the delicate balance of power that we have established?

The Conditions of Legislative Intervention

Positing faithful adherence to a constitutional scheme of judicial initiative there should be little risk of an outright legislative power-grab. That such gross usurpation of authority is not an altogether impossible contingency, however, is attested to by the history of New Jersey under its current Judicial Article.[180] But the real danger is

distinct and have no common link of connection or dependence, the one upon the other in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments."

179. *Id.* at 396.

180. Vanderbilt, C.J., records the incident in Winberry v. Salisbury, 5 N.J. 240, 250, 74 A.2d 406, 411 (1950): "Notwithstanding the rejection of the language of the proposed 1944 Constitution which would have emasculated the rule-making power of the Supreme Court, in 1948 the Legislature passed S-58, section two of which provided in part that the Rules promulgated by the Supreme Court, effective September 15, 1948, 'shall regulate practice and procedure in the courts established by the Constitution until modified, altered, or abrogated by law.' The bill was vetoed by the Governor who returned it to the Legislature on October 30, 1948, stating that in his opinion this provision was unconstitutional, 'for it would, if effective, completely deprive the Supreme Court of any further rule-making authority . . .,' 71 N.J.L.J.

that the legislature will resume control by slow encroachment. Piecemeal legislative tinkering within the framework of court rule might be ultimately more disastrous even than immediate return to statutory regulation. The continuing exercise of dual powers within the procedural realm would allow at best an unstable symmetry of system. We have sought to assure ourselves the advantage of professional wisdom and experience in the formulation of our rules of practice. If an ill-advised and unconsidered legislative whim can at a stroke refute the whole of this wisdom and experience, we have in fact gained very little.[181] But turn the adjectives around. Even were the court's initial rule unsound and the legislative act the very soul of wisdom, still a too-easy legislative intervention frustrates the whole end of judicial rule-making. We have seen that a cardinal virtue of the rule of court is its ready flexibility and immediate responsiveness to current problems, its ability to profit from the latest lessons of judicial empirical science and to move quickly in self-revision. If the court has made a mistake, it will be the first to know,[182] and under the rule-making scheme has ample opportunity for rapid change. If after this first alteration the experience of the next ten, or of twenty, years should produce a better system, it can again adapt. But once the legislature enters the field, the area covered by this intervention is fixed with the force of statute.[183] It cannot again be altered by the court, but must await the

389 (Nov. 4, 1948)." For discussion and suggestion that the threat of such wholesale legislative invasion may have influenced the *Winberry* decision, see Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 249 (1951). See also note 138 *supra*.

181. Pound quotes a speaker at a public hearing before the Judiciary Committee of the Senate of New Jersey as reporting: "Under the old system, when the legislature had the primary power of rule making, every Monday, when the legislature was in session, the hopper would be filled with bills by various assemblymen—young lawyers—who happened to lose a case and in whose judgment it was brought about because of deficiency in some rule of procedure. Immediately the hopper would receive some bill intended to cure that." Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 44 (1952). For the unfortunate Nebraska experience see note 36 *supra*. In Colorado the legislature has seen fit to revoke the power of the court to make one particular, unpopular rule, that relating to comment on the evidence. See note 7 *supra*.

Contrast the restraint of Congress after the adoption of the Federal Rules. "A search has turned up in the rules area only a single statute, one of no far-reaching import. Congress has seemed literally uninterested in all such proposals, and committee chairmen have quite regularly turned them over to the Court or the Advisory Committee for final attention. The fear of recurrence of legislative tinkering has been a profound stimulus for the presently contemplated reconstitution of the Advisory Committee." Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 (1958).

182. For the role which a Judicial Council should play in keeping the court informed see Clark, *supra* note 181, at 443-44.

183. The alternative of holding that the court may promptly promulgate a further rule which shall supersede the statute until the legislature act again (see the discussion of this possibility developing in Missouri, *supra* note 130) was wisely rejected in *Winberry*. See note 131 *supra* and text at that point. Compare the discussion in Kaplan & Greene, *supra* note 180, at 248.

superior pleasure of the legislature. However wise and immediately successful the statute at the time of its enactment, it is inelastic. Over the course of years this point of petrification in the viable body of procedure may be expected to grow as painful as a gallstone.

The life of constitutions is a long one. Statutes accumulate. If the legislature is given unqualified power to overrule the courts on matters of procedure there may well come a time, in the course of that long life, when the jurisdiction will arrive at what is in effect a return to the rigidities of code procedure. To affirm the power of self-regulation of the courts and to restrict the dangers of statutory whim and statutory petrification, qualifications must be placed upon the legislative supremacy. It is important that the legislature have power of review. But it is equally important that that power be exercised only upon due deliberation and that, once exercised, its products shall be subject to periodic reappraisal.

Three basic safeguards should suffice to secure these ends. The first is that an enactment which would effect the repeal or amendment of any existing rule of court or which would establish a new procedural regulation, whether or not inconsistent with existing rules, should be required to receive some portion more than a simple majority vote in the legislature. In this we have the precedent of the new Alaskan Constitution which provides that court-made rules may be "changed by the legislature by two-thirds vote of the members elected to each house." [184] The effect of such provision is to discourage rash and too-facile intervention in the business of the courts. Legislative attention is focused upon a bill proposing to regulate court procedure and substantial legislative support is required for its passage. This is in accord with the fundamental proposition that the place of the legislature in the field of judicial administration and procedure should be that of a reserved ultimate reviewing power, not that of a frequently-intervening supervisory force. On the whole, the courts can be expected to manage their own business as well as it can be managed. If in some particular they do not, they should have a first chance to experiment and change. Recurrent legislative overhaul of mere mechanics is not in order. It is only in the case of a persistent and flagrantly unpopular course of judicial conduct, a case in which the courts have made an important decision of public policy and made it in a way that substantially opposes the strong sense of popular opinion, that appeal to overruling legislative authority is needed. In such a case public disapproval of judiciary policy should express itself in a strong preponder-

184. See note 36 *supra*.

sence of the legislative vote. Two-thirds of the legislators selected to each house should concur upon the need for intervention before the legislature moves to intervene.[185]

Second, before the legislature enters the area of court procedure it should understand the views of the court. This could be assured constitutionally by a provision that, in consideration of a bill proposing an enactment to regulate judicial administration on procedure, the chief justice of the supreme court shall be given an opportunity to be heard. The voice of the chief justice will impress upon the legislators the importance of the enactment under consideration. It will be able to appraise for the voting legislators the effect of the proposed alteration upon the whole judicial scheme of business and to approve or disapprove with the influence of authority. This in itself may suffice to put the matter to rest. If, however, the legislative scheme seems good, the court, once brought to consider it, may choose itself to adopt the proposal by rule of court and altogether obviate the need for legislative action. If the words of the proposal embody some unclarity, the court, with its more practiced eye and experienced understanding of the concrete situations in which question may be expected to arise, can request a clearer exposition of legislative intent and by so much reduce the risk of multiplying litigation of procedure. And if there occurs actual conflict between judicial and legislative opinion, compromise is possible before enactment. The precise manner in which the chief justice shall communicate the views of his court must be left to the convenience of court and legislature. But that he shall in some manner be heard on issues of concern to the court is of such primary importance as to demand express constitutional provision.

Third, provision should be made for the automatic termination of effect of all such enactments, so that the areas frozen down by legislative intervention may again become, within a reasonable time, accessible to alteration by the courts. To achieve this essential flexibility of renovation a Judicial Article should require that any statute governing court procedure or administration shall have the force and effect of statute only during a period of six years [186] immediately following the date of

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[185] This is not intended, nor should it operate, to deny the governor a right of veto. The added influence of the chief executive, and the further reflection required by reconsideration may prove significant. *Cf.* the role of the Governor in the New Jersey experience, note 180 *supra*.

[186] As is clear from the text, the legislature may act to change a rule of court or it may intervene to add a provision dealing with a problem not specifically covered by any court rule, or it may take the initiative and deal with a larger area concerning which rule provisions at all have been formulated by the court as, *e.g.*, execution of judgments or evidence. The special conditions, including the two-thirds rule, should apply equally in all of the situations mentioned.

Where a legislature meets only once every two years, a shorter period would not appear appropriate and a longer period involves risks of rigidity.

its taking effect and shall, at the expiration of those six years, cease to have the effect of statute, but shall continue in effect as a rule of court subject to repeal or amendment by the court or by two-thirds vote of the members elected to each house. During the six years of statutory effect, the enactment may of course be repealed, altered or reenacted by the legislature in the same manner, and any amendment or reenactment will then be immune from court alteration for a period of six years from the time it takes effect.[187] In establishing such a pattern of limitation, a merry-go-round of regimes is not to be feared. Over a period of six years, the courts will have thoroughly tested out any legislative plan of procedure, established its merits, learned to live with its deficiencies. If at the end of that time, the court feels that there is still a strong preponderance of legislative support for the plan, the court will no doubt consider seriously whether to defer to the legislative will rather than run the risk of overturning the procedural scheme only to have it turned back up again by legislative override. Deference is not unlikely. Thus the legislature remains influential even in inaction. The very existence of potential legislative veto forces the courts themselves to regard problems of procedure from the legislative as well as from the judicial viewpoint. But if the legislative plan has seriously hampered the courts, the court will change it, and the chief justice will be prepared to argue convincingly to the legislature the necessity of such change. In the light of experience, the legislature may now be ready to surrender its own scheme and to accept that proposed by the court, or at least to consider compromise. Or if the plan is one which a strong majority of the legislators deem too clearly dictated by public policy to compromise, the legislature may reenact it every few years and thus entirely forestall return to court rule. But such reenactment will not go without reappraisal. Positive action by two-thirds of the legislators elected to each house is again required, and the chief justice must be heard. The legislature must reappraise its own enactments upon pain of having the court reappraise them. Any area of procedure "frozen down" under this scheme will in the long run be frozen not by inertia, but by virtue of a strong continuing support among the elected representatives of the people. This is as it should be. Procedure, neither unstable nor overrigid, remains responsive to the urges of both court and legislature.

187. Where an amendment serves only to make minor changes in a procedural statute it should not necessarily be held to extend the effective period of the original statute beyond the first six year period. It will be for the court to determine, in the light of the context of legislative history as well as the form by which the change was effected, whether the second act constitutes a reaffirmation of the basic legislative policy of the first.

Conclusion

The whole aim of the balance of powers suggested in this paper is the creation of a scheme whereby the courts may maintain an effective, flexible and thorough-going control over their own administration and procedure, with the possibility of ultimate legislative review in cases where important decisions of public policy are necessarily involved. This is the aim of safe efficiency: immediately practical, fundamentally democratic. It is intended to encompass all matters traditionally considered "adjective law", all pleading, pretrial, trial and post-trial mechanisms, all evidence, including presumptions and privilege, and the whole of the internal organization of the modern court system. Such a balance of powers might be established, we believe, by a constitutional provision essentially as follows:

1. *The supreme court shall make rules governing the administration, practice and procedure, including evidence, of all courts in the state.*

2. *Such rules, or any statute enacted under this paragraph, may be repealed, amended or supplemented by the legislature by two-thirds vote of the members elected to each house, and any such enactment shall have the force and effect of statute during the six years next following the date of its taking effect and shall thereafter have effect as rule of court until repealed or amended by the supreme court or by the legislature.*

3. *In consideration of any bill proposing an enactment under this section, the chief justice of the state shall be given opportunity to be heard.*

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NOTES

RULE 83 AND THE LOCAL FEDERAL RULES

INTRODUCTION

Since their promulgation by the Supreme Court in 1938, the Federal Rules of Civil Procedure have been closely examined by innumerable scholars, attorneys and judges. The power granted the district courts in Rule 83 to enact additional rules to regulate their local practice,[1] however, has been little discussed.[2] No general analytical guidelines for weighing the desirability or validity of a given local rule have been developed.[3] As a result, the majority

1. Rule 83 is not the only grant of rule-making power to the district courts. There are four other specific grants within the Federal Rules themselves: Rules 16, 40 and 79(c), 66, and 78. In addition, 28 U.S.C. § 2071 (1964) is a statutory grant closely approximating Rule 83, and there are several specific grants throughout title 28. *See, e.g.*, 28 U.S.C. §§ 137, 139-41, 751-54, 1863(b), and 1914(c) (1964). Finally, in some areas the district courts may have an inherent power to regulate the practice before them. *See, e.g.*, Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F.2d 825, 826 (10th Cir. 1948) (The power to dismiss for want of prosecution is "inherent and independent of any statute or rule.").

2. The only other extensive article on the local district court rules is Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011.

3. The major exception is the JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMM. ON LOCAL DISTRICT COURT RULES (1940) [hereinafter cited as KNOX REPORT]. This report is discussed below. See notes 30-35 and accompanying text, *infra*. *See also* pt. II, B *infra*.

The Supreme Court has passed upon the scope of district court rule-making only once—in Miner v. Atlass, 363 U.S. 641 (1960) (admiralty). However, no clear guidelines for local rules emerge from the case. The issue was whether district courts by local rule pursuant to Adm. R. 44, 254 U.S. App. at 20 (1920), could create a system of testimonial discovery depositions based upon FED. R. CIV. P. 26. Admiralty Rule 44 is virtually identical to Federal Rule 83. The majority opinion, by Justice Harlan, dismissed as not decisive the fact that the Supreme Court had failed to adopt such a discovery procedure in the Admiralty Rules, although it had been recommended:

> [T]he failure to adopt Civil Rule 26 implies no more than that this Court did not wish to *impose* the practice on the District Courts, and does not necessarily bespeak an intention to foreclose each District Court from exercising a "local option" under Rule 44.

363 U.S. at 648 (emphasis in original). The Court also rejected the contention that whenever a set of rules dealt with part rather than all of a subject the district courts could not pass local rules as to the areas unprovided for. But it found fault in the local discovery rule because of the "particular nature and history" of the subject matter regulated:

> [I]ntroduction [of discovery by deposition] into federal procedure was one of the major achievements of the Civil Rules . . . . [T]he matter is one which, though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditional always been highly esteemed.
>
> . . . [W]e should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power . . . .

Id. at 649-50.

The dissent, written by Justice Brennan and joined by Justices Douglas and Stewart, rejected the idea that the difference between a big change and a small change was critical. Since the rule was passed by a district court, it was a local rule whether or not it made a basic change in procedure. Thus it was valid unless "inconsistent" with the Admiralty Rules. Because there was no prima facie inconsistency, the rule should be upheld. The

of district courts have, in promulgating rules, ignored the principles of simplicity, scarcity and uniformity which guided the formulation of the Federal Rules.[4] At times, district courts have used their power under Rule 83 to negate specific requirements of the Federal Rules;[5] more often, simply to escape from the arduous but essential task of case-by-case analysis. This Note will explore the contrast between the intended and actual use of the rule-making power given by Rule 83—between what local rules were meant to be and what they have become. It will also examine and criticize the ways in which courts, especially appellate courts, have responded to this disparity when it has been relevant to litigation before them.

I. The Purposes of Rule 83

Federal Rule of Civil Procedure 83 provides:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

The first and last sentences of the rule grant two distinct powers; they will here be called the rule-making power and the decision-making power. The text of Rule 83 does not suggest that either is more important, or should be used more frequently than the other. Since the only explicit limitation on

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dissent also noted that the experience gained through the use of this rule, and similar "basic change" rules, would provide valuable information which could help the Court decide whether the change should be made general.

The Supreme Court subsequently adopted a discovery-deposition rule for admiralty. See Adm. R. 30A, 368 U.S. 1023 (1961).

A broad reading of the *Miner* decision would greatly restrict the Rule 83 powers of the district courts. See 36 N.Y.U.L. Rev. 228 (1961). The decision is basically sound, however, if kept in context. Discovery depositions were historically inadmissible in admiralty cases except for specific statutory exceptions, *see* Rev. Stat. § 863-865 (1873), and, as Justice Harlan points out, the whole system of discovery was created for the district courts by the Federal Rules and adopted in part in the Admiralty Rules. Also, although only a few districts had promulgated local discovery rules, over half of the admiralty litigation occurred in those districts. Finally, the Supreme Court had repeatedly rejected a general discovery rule; its later adoption was a major innovation. The decision does not, therefore, restrict the Rule 83 rule-making powers to inconsequential matters; it only limits them to areas which are not of such basic importance that they can properly be regulated only by the Supreme Court.

4. *See, e.g.*, A.B.A., Institute on Federal Rules, Cleveland 189 (1938) [hereinafter cited as Cleveland Institute]; A.B.A., Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City 28, 232 (1938) [hereinafter cited as A.B.A. Proceedings]. These proceedings were held under the auspices of the American Bar Association. The participants were members of the Advisory Committee on the Federal Rules. Three symposia were held, one at each of the above named cities, during the summer and fall of 1938. The format typically included speeches by Advisory Committee members on specific sections of the then new Rules, followed by question and answer sessions.

5. See note 45 and accompanying text *infra*.

local federal rules is the obvious one that they be "not inconsistent" with the rules devised by the Supreme Court, it is not surprising that district judges have interpreted Rule 83 to allow them, as a group, to prejudge some of the many questions committed to their discretion by the Federal Rules.[6] Free use of the rule-making power can spare judges many difficult decisions on individual problems. However, the background against which Rule 83 was enacted and the contemporaneous statements of its draftsmen and others make clear that no such extensive rule-making was contemplated. The rule-making power was expected to be used infrequently, most often in areas not covered at all by the Federal Rules.[7] Much greater reliance was to be placed on the decision-making power; escape from difficult, case-by-case adjudication is contrary to the spirit and purpose of the Federal Rules.

A. *The Background of the Rule*

Before 1938, grants of rule-making competence to the district courts were severely limited in their scope by the Conformity Act,[8] which compelled federal district courts to follow the procedures of the states in which they sat. But district courts from their inception have been granted some rule-making powers. In 1793 federal trial and appellate courts were given congressional permission to regulate their own practice, except as limited by the laws of the United States.[9] In fact, Rule 83 itself is closely modeled upon two

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6. See text accompanying notes 53-55 *infra*.

7. Virtually every rule in the suggested local rules of the Knox Committee report can be promulgated under a grant of power other than Rule 83. *E.g.*, proposed rule 1(b), dealing with admissions of attorneys to the local federal bar is authorized by 28 U.S.C. § 1654 (1964); proposed rule 6, dealing with calendar matters is authorized by 28 U.S.C. § 137 (1964) and FED. R. CIV. P. 16 and 40. These independent authorizations are "open-ended," conferring broad powers rather than enumerating specific, detailed practices. For instance, compare any of the above with 28 U.S.C. §§ 1861-65, 1869, 1870 (1964), which govern jury practice. Many detailed statutory and Federal Rule provisions have, however, been laboriously repeated in local federal rules. *See, e.g.*, D.N.J. GEN. R. 19 which repeats in substance the jury-practice statutes.

8. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197. *See* Chisholm v. Gilmer, 299 U.S. 99 (1936); Hecker v. Fowler, 69 U.S. (2 Wall.) 123 (1864). Prior to the Conformity Act, the federal courts regulated their own practice. *See* Livingston v. Story, 34 U.S. (9 Pet.) 632 (1835); Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51 (1825); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

9. Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335:

> . . . That it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.

This provision was made applicable to the district courts as such by Act of March 3, 1911, ch. 231, § 291, 36 Stat. 1167. The Act of March 2, 1793 was adopted from the Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276 and the Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83. These grants of rule-making power were held constitutional. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) (by Marshall, Ch. J.); Cooke v. Avery, 147 U.S. 375 (1893). And they were construed as granting the federal courts wide discretion within the general boundaries of conformity to state procedure set by Congress. *See*

earlier grants of a similar power—28 U.S.C. § 731[10] and Equity Rule 79.[11]

There are some differences in wording, however, between Rule 83 and its predecessors. Most obviously, the earlier grants of power contained no reference to a decision-making power. Such a power is indispensable to any system of procedure, of course, and its existence was recognized before the Federal Rules,[12] but the draftsmen of the Rules, by mentioning the power, placed a new emphasis on it. This might have suggested to district courts that they could rely less on local rules, and more on ad hoc decisions. The courts, however, have not taken the hint.

Pre-1938 statutes granting rule-making power to federal courts included statements of purpose; the power was to be exercised with a view to "the advancement of justice and the prevention of delays."[13] The omission of any such language from Rule 83 does not mean that these unexceptionable goals are to be abandoned, but they are mentioned only in Rule 1.[14] The need for such a reference is a reminder that the Federal Rules are a coherent whole, and that local rules enacted pursuant to Rule 83 should conform to the policies underlying the Rules in general—including simplicity, uniformity, and flexibility. Again, many district courts seem to have missed the point.

More important than the language of the rule in showing its differences from its forerunners is the context in which it was enacted. Rule 83 was designed to be part of a new independent system of federal procedural law. The restrictions of the Conformity Act were to be ended.[15] Local rule-making

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Shepard v. Adams, 168 U.S. 618, 625 (1898); The Columbia, 100 F. 890 (E.D.N.Y. 1900) (admiralty).

10. REV. STAT. § 918 (1873) (now 28 U.S.C. § 2071 (1964)):
The district courts may, from time to time, and in any manner not inconsistent with the laws of the United States, or with any rule prescribed by the Supreme Court . . . , make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

11. Equity R. 79, 226 U.S. 673 (1912):
With the concurrence of a majority of the circuit court judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

See U.S. SUP. CT., PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE 168 (1936); U.S. SUP. CT., REPORT OF THE ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE 214-15 (1937); RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, S. Doc. No. 101, 76th Cong., 1st Sess. 299 (1939).

12. *See, e.g.*, Payne v. Garth, 285 F. 301 (8th Cir. 1922).

13. REV. STAT. § 918 (1873). This exhortation was left out of the present version of the statute—28 U.S.C. § 2071 (1964):
The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.
Compare the statement of purpose in Act of March 2, 1793, quoted in note 9 *supra*.

14. *See, e.g.*, Woodham v. American Cystoscope Co., 335 F.2d 551, 557 (5th Cir. 1964).

15. The context also differed greatly from that of the earliest grants of rule-making

was still to be interstitial, but the interstices to be filled were not in state law, but in the Federal Rules themselves. The existence of a new and distinctively federal procedure should have given district courts a new source of guidance in exercising—or declining to exercise—the rule-making power granted in Rule 83.

B. *Contemporaneous Comments by the Draftsmen*

There is no significant "legislative history" of Rule 83. The Notes of the Advisory Committee which drafted the Federal Rules provide little assistance in the search for "legislative" intent. But members of the Committee participated in three American Bar Association symposia, held after the publication of the Rules in 1938 in an attempt to acquaint attorneys with the new procedure. Statements made at these symposia are probably accurate reflections of what the draftsmen intended, and the Supreme Court has said that such statements are relevant to the Rules' interpretation.[16] The symposia are a virtually untapped source of information on the purposes of Rule 83. Generally, the members of the Advisory Committee who appeared at the symposia viewed the Rule more as a description of an obvious, limited duty than as a grant of an affirmative rule-making power. They believed that very few rules needed to be formulated under the first sentence, and that most problems left unanswered by the Federal Rules should be disposed of under the decision-making power.

The most detailed exegesis of Rule 83 was given by Edgar Tolman[17] in the Washington proceeding. He said that "gaps" in the Federal Rules were left intentionally where the subject matter was too variant or of unique local concern—for example, rules governing the time for and the conduct of oral arguments to the court and jury.[18] However, because of the comprehensiveness of the Federal Rules, such gaps were few, and most had resulted from a decision that such a situation was rare or relatively unimportant and should be dealt with upon an ad hoc basis, "in accordance with general principles of justice and common sense."[19] The final sentence of Rule 83 provided for such an approach. For this reason, Tolman viewed the Rule as one of the "most important and salutary" of the Rules:

> [Rule 83] puts an end to the whole Conformity Act, and it permits judges to decide the unusual or minor procedural problems that arise in any system of jurisprudence in the light of the circumstances that

power in the 1789 to 1874 period. There were very few federal courts then. Most were staffed, in part at least, by Supreme Court justices, and there seems to have been very little interest in codifying procedural rules. Procedural law during most of the period still retained its common law basis and nature.

16. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444-45 (1946).

17. Mr. Tolman was the Secretary of the Advisory Committee and editor-in-chief of the American Bar Association Journal.

18. A.B.A. PROCEEDINGS, *supra* note 4, at 128-29.

19. *Id.* at 129.

> surround them and of the justice of the case without the complications and injustice that must attend attempts to forecast the situations and to regulate them in advance either by general or by local rule.[20]

Tolman feared that the trial courts were ignoring the import of the last sentence of the Rule and were passing too many local rules. This frustrated the draftsmen's hope for a "simple, flexible, manageable mechanism with as few rules as possible."[21]

Tolman's views were supplemented at a later symposium by William Mitchell, Chairman of the Advisory Committee on the Federal Rules. Mitchell placed primary emphasis on the abolition of the Conformity Act and the consequent shift of responsibility to the federal district judges. This responsibility should not include much rule-making, however; the federal rules were meant to cover adequately most procedural questions. To illustrate his point, Mitchell criticized a local rule which added additional steps to the procedure for perfecting appeals established by Rule 75. He believed the Rule itself provided for "every essential step" and "worked satisfactorily."[22] The Rule's authors had economized on detail "deliberately for the sake of simplicity and brevity."[23] If the district courts continued to use the Rule 83 rule-making power to "add meticulous details that they think improve the Supreme Court rules, simplicity and flexibility will be impaired, and uniformity will be destroyed . . . ."[24] Thus, the district courts were granted a limited competence: they could promulgate local rules in areas where there were gaps left for that purpose because of recognized local needs, but not where the Federal Rules were arguably adequate.[25] Most issues arising under or not covered by the Federal Rules were to be dealt with under the decision-making power by the individual judge.

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20. *Id.* In a speech before the American Bar Association, Tolman more fully expressed his view that the intent of the drafters of Rule 83 was to:

> cut the details of the rule to the lowest possible limit, leave something for local rules for the district courts to prescribe, and leave still more untouched and not prescribed as fixed rules but trusted to the good sense and good faith of court and counsel to be worked out by them to fit the particular situation.

22 A.B.A.J. 780, 786 (1936).

21. A.B.A. PROCEEDINGS, *supra* note 4, at 130. The need for simplicity was forcefully stated by the Chairman of the Washington Seminar on Patent Litigation, Thomas Robertson. Chairman Robertson felt that the Federal Rules were sufficiently simple that the three-day Washington proceeding would be enough to familiarize the attorneys with them, but that "if all the District Courts in the United States are going to supplement these rules, it is going to be an exceedingly difficult thing to see where simplicity comes in." *Id.* at 164.

22. A.B.A. PROCEEDINGS, *supra* note 4, at 327.

23. *Id.* at 232.

24. *Id.*

25. Two examples of the types of "gaps" the speakers felt the Rule 83 rule-making power should be used to fill were given at the Washington proceeding. Tolman pointed out that the ten day period in which to request a jury trial under Rule 38(b) meant ten days after issue was joined. Since it would be unfair to consider a Rule 12(b) motion which raised an issue of fact as joining issue, a local rule was necessary to regulate jury requests when the issues were raised by Rule 12(b). A.B.A. PROCEEDINGS, *supra* note 4, at 117-18. The second example concerned the proper procedure for obtaining a *scire*

Certain remarks by Dean Charles Clark suggest that he too thought the rule-making power less important than the decision-making power. Early in a symposium he said that the phrase "order of the court," as used in the Federal Rules,[26] included both standing rules and special orders.[27] After further consideration and after consultation with other members of the Committee, Clark reversed himself. He concluded that the term encompassed only "a special order in the pending case"[28] and that where general orders were permissible they were provided for explicitly.[29] It may be inferred that standing rules are not, in general, to be looked on with favor.

C. *The Knox Committee Report*

In accord is another prestigious authority on the intended scope of Rule 83. In 1938, the Chief Justice appointed the Committee on Local District Court Rules (Knox Committee), which made a study of the local rules then existing. In its 1940 Report, the Committee proposed nine rules for the district courts.[30] The Report concluded that completely uniform rules were "neither feasible nor desirable" but that "supplementary local rules [should] be kept at a minimum."[31] This latter suggestion was based upon the Committee's understanding that:

> Apparently the Supreme Court and its Advisory Committee intended as far as possible to cover generally in the Federal rules all aspects of the civil practice that need to be regulated in advance by rule of court, and to leave to the discretion of the trial judge the conduct of details of procedure and the regulation of unusual situations as they arise in litigation and as the circumstances and the justice of the case may demand. Rule 83 of the Federal Rules of Civil Procedure strongly evidences this purpose by the very significant provision of its last sentence . . . .

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facias since the writ itself was abolished by Rule 81(b). Judge George Donworth felt this was a case in which Rule 83 was clearly meant to apply, especially since Rule 81(b) provided that *scire facias* relief "may be obtained by appropriate action. . . ." *Id.* at 205-06.

An example of an improper local rule was one which directed the district court to look to state procedure if there were no federal, local or old equity rules either on point or analogous to the question at issue. The "reference to the local state practice is a partial return to the system of conformity which these rules have rejected, and which the last sentence of Rule 83 was intended to abolish." *Id.* at 130. For a discussion of present rules which require such a reference to state law see note 55 *infra*.

26. *See, e.g.*, FED. R. CIV. P. 6(d). *See also* FED. R. CIV. P. 51. *Compare* FED. R. CIV. P. 78.

27. CLEVELAND INSTITUTE, *supra* note 4, at 215-16.

28. *Id.* at 219.

29. For examples of such grants of power see note 1 *supra*. *See also* note 7 *supra*.

30. The proposed rules governed, in numerical order: Attorneys; Motions; Service of Papers; Orders, Findings, and Judgments; Files and Filing; Calls of Docket—Preparation of Calendars; Security for Costs; Court Officers as Sureties; and Receiverships. KNOX REPORT at 27.

31. *Id.* at 7. See also comments by Dean Clark before the American Bar Association: "One of the problems to be faced is the wide diversity of conditions existing in different parts of the country and rules must be adjusted to accommodate themselves to that diversity." 22 A.B.A.J. 787, 789 (1936).

To the extent that modern advances in modes of travel and means of communications have diminished the physical diversity between districts since the 1930's, the local conditions argument is less valid today.

> The conclusion that most direct courts can function with very few local rules is fortified by communications received from numerous judges who state that the Federal Rules of Civil Procedure without supplement of any nature are quite sufficient for their needs.[32]

The Report recommended a thorough revision of local rules, with the elimination of those that were unnecessary as well as those inconsistent with the Federal Rules, and promulgation of new rules only when "a pressing need for them exists."[33] Local rules should avoid prescribing unnecessary detail to prevent rendering "just and valid judgments" doubtful on technical grounds.[34] The rule-making competence of district courts should be restricted: standing orders were desirable only where the subject matter was especially of local concern and regulation was necessary.[35] In all other cases, either the Federal Rules should be adequate or the judge should make an ad hoc decision.[36]

The background of Rule 83, and the views of its authors and those first charged with its evaluation, confirm that the rule-making power granted in its first sentence was meant to serve the purposes of a new system of procedure, a system in which detail was to be kept at a minimum and responsiveness to the peculiar problems of particular cases at a maximum.[37] Superfluous rule-making was to be avoided as inimical to these purposes, as well as to the new uniformity of federal practice;[38] the decision-making power was to be relied

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32. KNOX REPORT at 10.
33. *Id.* at 12.
34. *Id.* at 13.
35. See note 7 *supra*. The Knox Report's effect upon present local rules is negligible, at most. For a rare instance of citation to this source, see *In re* Crow, 283 F.2d 685, 686 (6th Cir. 1960).
36. Of course, the Federal Rules are not perfect but their defects are better corrected by the amendment process than by local rules. Revision of the Federal Rules is not a difficult or especially long process. *See, e.g.*, note 111 *infra*. In the interim between the discovery of the problem and amendment, the problem is best left to ad hoc decisions. Thus flexibility can be preserved, and a variety of decisions on point should prove quite valuable to the Advisory Committee in formulating their amendment and to the Supreme Court in promulgating the new Rule.
37. *See* Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 445 (1958). Clark's "Gresham's Law of procedural precedents" is that the Federal Rules tend to become rigid because of the bodies of precedents which build up around them. This theory is equally applicable to local rules. District courts begin to follow local rules blindly even if they are discretionary in tone, thus deciding only whether the guidelines in the local rule match the facts of the pending case.
38. *See* A.B.A. PROCEEDINGS, *supra* note 4, at 71, where Dean Clark in his discussion of the local rules of the District of Columbia court, said:

> [I]t will be helpful to lawyers from other parts of the country if you will keep your local pleadings simple, in order that we may understand what you are doing. I think that that is the whole theory of the rules anyway, that they shall be general. Local rules made under Rule 83 should, therefore, be limited in number and should fit into the general scheme.

Mr. Mitchell was more blunt on this subject. Local rules designed to add detail to the Federal Rules tend "to destroy uniformity in practice throughout the United States." A.B.A. PROCEEDINGS, *supra* note 4, at 327.

The use of "uniformity" in this context means not that results should be uniform but that the same basic rules and policies, *i.e.*, the same starting points, should be applied to problems throughout the federal system. This, of course, differs greatly from the

on heavily, as fundamental to the wise and flexible administration of justice envisioned by the draftsmen of the Federal Rules. The symposia and the Knox Committee Report reflect some dismay at the early proliferation of local rules. The present use of the rule-making power gives at least as much cause for concern.

II. The Present Use of Rule 83

A survey of the current state of the local federal rules makes clear that the system envisioned by the draftsmen of Rule 83 has not come into being. "[D]istrict courts around the country are spawning [local rules] in great numbers. The Federal courts of this country are becoming a kind of procedural Tower of Babel because of the differences in local rules."[39] Today there are over two thousand local rules—many with several subsections[40]—in effect in the 89 federal districts.[41] Although some of these rules were promulgated pursuant to statutes,[42] most rest upon the rule-making power of Rule 83.[43] The most common areas of coverage are those mentioned in the Knox Committee's suggested rules, but virtually every conceivable area of federal procedure not clearly pre-empted by the Supreme Court rules is encumbered with local regulations.[44] Some are in fairly obvious conflict with the Federal Rules.[45] "Others cover ground upon which the Federal Rules are intended to be complete. Others attempt to lay down rigid details to implement or supplement the Federal Rules in minor particulars which had been deliberately left unregulated because of the belief that the method of dealing with them could be best determined in individual cases as the problems arise."[46]

Conformity Act practice, under which federal district courts looked to state procedural law in some cases and federal procedural law in others. Uniformity in application of rules in all district courts is not a practical goal; some uniformity of approach is attainable.

39. Professor M. Rosenberg, testimony before the Subcomm. on Improvements in Judicial Machinery of the House Comm. on the Judiciary, Apr. 21, 1967.

40. *See, e.g.*, D.D.C.R., Pretrial Instructions to Counsel.

41. This figure does not include local admiralty, bankruptcy, and criminal rules. In all there are probably over 2500 local rules of all kinds—an average of over 25 per district.

42. *See, e.g.*, N.D. Cal. R. 103 and D.N.J. Gen. R. 19(B), (C), excluding classes of persons from jury service under 28 U.S.C. § 1863 (1964); D. Me. R. 10 and D. Minn. R. 7(1), providing for prepayment of fees under 28 U.S.C. § 1914(c) (1964).

43. None mentions the general statutory grant of authority, 28 U.S.C. § 2071 (1964).

44. For a partial list of topics covered by local rules, see the 21-part analysis in Comment, 1966 Duke L.J. 1011. See also the rules for the Northern District of Illinois, Southern District of New York, and Middle District of Pennsylvania which are almost as numerous as the Federal Rules themselves.

45. *See* Knox Report at 10-11. *Compare, e.g.*, D. Alas. Gen. R. 4(c) with Johnson v. Manhattan Ry., 289 U.S. 479 (1933). *Compare* D.D.C. Gen. R. 9(a)(4) *and* Blackmon v. Lee, 12 F.R.D. 411 (D.D.C. 1952), *off'd*, 205 F.2d 13 (D.C. Cir. 1953), *with* Kernan v. Kernan, 165 F.2d 232 (D.C. Cir. 1947), *and* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452 (1958).

46. Knox Report at 11.

The content of the rules is not the only difficulty they present. Until recently, there was no general publication of them. Finally, in 1964 the Federal Rules Service undertook to maintain a comprehensive collection of existing local civil rules. Districts use various means to publicize their local rules, ranging from reprinting them in law reviews and

Even in areas where some local rules are undoubtedly necessary, district courts tend to do too much rule-making. For example, Federal Rule 16 explicitly calls for the establishment of permanent guidelines for the regulation of pre-trial conferences. But the Rule was never intended to turn the conferences into trials within trials.[47] Yet the District of Columbia district court has created by local rule a system afflicted with the very complexity and formality that the Federal Rules were designed to end.[48] This court's pre-trial procedure is set forth in ten pages of detailed instructions, which in effect require counsel to replead their case with an elaborate precision that contrasts dramatically with the simplicity of the Federal Rules forms.[49] These forms "are intended to indicate the simplicity and brevity of statements which the [federal] rules contemplate."[50] It is admittedly proper to require fuller exploration of issues at pre-trial, but the extreme prolixity of the District of Columbia rule—which has been held up as a model for other courts[51]—is a dismaying departure from the spirit of the Federal Rules and risks turning the pre-trial conference into a mechanical checklisting procedure rather than a creative exploration of the matter in controversy.[52]

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bar journals, *see, e.g.*, 19 MONT. L. REV. 3 (1957), to separate publication in pamphlet form, *see, e.g.*, D.N.J. GEN. R. 45. Although it may be assumed that the local bar has adequate access to the rules, non-residents may well be substantially uninformed. This necessarily undermines the utility of striving for uniformity in federal procedural practices. *See "Open Forum" Discussion of Proposed Rules of Civil Procedure*, 23 A.B.A.J. 965 (1937); A.B.A. PROCEEDINGS, *supra* note 4, at 71. Nor are permanent advisory committees established within most districts to provide continuing review and revision of the local rules. Such committees could aid in attaining uniformity among local rules, especially for all districts within one state; help to publicize the rules; and advise district courts on the developing body of relevant case law. Finally, the present local rules are much too detailed. *See Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 250-51 (1961). The burden of excessive detail, like that of needless numbers, interposes local rules between the court and a fair and speedy adjudication of the claim on its merits.

47. *See* Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961); Jones v. Union Auto Indem. Ass'n, 287 F.2d 27 (10th Cir. 1961).

48. *See* D.D.C. R., PRETRIAL INSTRUCTIONS TO COUNSEL. Also see D.D.C. GEN. R. 12.

49. *See* FED. R. CIV. P. FORMS 3 *et seq.*

50. FED. R. CIV. P. 84.

51. *See* Holtzoff, *Federal Pretrial Procedure*, 11 AM. U.L. REV. 21 (1962).

52. The District of Columbia rule gives every case over to a pretrial examiner whose orders become the order of the court unless objected to within five days. D.D.C. GEN. R. 12(c), (f). This seems to violate Federal Rule 16, which states that "the court may in its discretion direct the attorneys for the parties to appear before *it* for a conference. . . ." (emphasis added). In the analogous situation of referrals to special masters under Rule 53(b), the power of the court to order the parties to appear before a non-judicial examiner is clearly limited to exceptional cases. *See* LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); McCullough v. Cosgrave, 309 U.S. 634 (1940). *See also* Kaufman, *supra* note 45. In addition, the Court of Appeals for the District of Columbia has held that a local rule which referred all marital rights cases to a Domestic Relations Commissioner for a pre-trial report was invalid. Kernan v. Kernan, 165 F.2d 232 (D.C. Cir. 1947). *But see* Blackmon v. Lee, 12 F.R.D. 411 (D.D.C. 1952), *aff'd*, 205 F.2d 13 (D.C. Cir. 1953) (all veterans' cases to a Commissioner of Veterans' Cases). Since Federal Rule 16 clearly directs that "the court may" hold the conference and that "the court shall" prepare the pre-trial order, this local rule seems an abdication of the judges' duty. *Cf.* Holiday v. Johnson, 313 U.S. 342 (1941), in which the referral of a habeas corpus hearing to a commissioner was held invalid because the habeas statute speaks only of the court, judge, or justice.

Excessive rule-making generally has produced a number of unhappy results. Besides giving rise to unnecessary grounds for reversals or dismissals of otherwise valid claims,[53] placing inordinate burdens on non-local counsel,[54] and undermining the Supreme Court's attempt to establish a simple, uniform federal procedural system,[55] the present district court rules are increasingly substituting advisory opinions of the majority of his colleagues for the informed discretion of the individual judge. This tendency is especially common, and especially pernicious, in the area of pre-trial discovery, an area in which the Federal Rules rely heavily on the trial judge's discretion.

The discovery process, as described in Federal Rules 26-37, is largely given over in the first instance to the parties themselves, with appeal to the trial judge in cases of disagreement. There is a strong tendency in the local rules to predetermine the issues most likely to be raised by such appeals. For example, although courts of appeals have emphasized the need for latitude in establishing timetables for initiation and completion of the discovery processes,[56] a great many districts have local rules imposing specific limitations upon the total time allowed for the completion of discovery.[57] The wide

53. *See* Woodham v. American Cystoscope Co., 335 F.2d 551, 552 (5th Cir. 1964). An Alabama lawyer "was unaware of the [Georgia] district court's ground rules. Because of [his] failure . . . to comply with the local rules, the district court dismissed the complaint." The local rules governed association with local counsel, the filing of briefs on motions, and perfection of service.

54. *See id.* The Northern District of Georgia has 39 local rules; the Alabama District Courts have only one among them. Such problems may be even greater where differences between two districts are slight. *E.g., compare* D. ARIZ. R. 20 with C.D. CAL. R. 14(a). The former requires all jury instructions be submitted at the beginning of trial, while the latter requires they be submitted five days before trial. See note 111 *infra*. *Compare* D. NEV. R. 7(d)(2) *with* D. IDAHO R. 4(e). The rules provide 9 and 10 days, respectively, to answer a motion for summary judgment. Under FED. R. CIV. P. 6(a) this difference of one day can actually become four days, for if the ninth day falls on a Friday and the following Monday is a legal holiday, the tenth day is Tuesday.

55. For example, some local rules call for state procedure to govern in the absence of any controlling federal rule. *See, e.g.*, S.D. CAL. R. 27; N.D. GA. R. 2; N.D. ILL. CIV. R. 19. Such rules undermine the whole concept of an independent federal system. *See* Lumberman's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963) (Wisdom, J.), as quoted with approval in Hanna v. Plumer, 380 U.S. 460, 472-3 (1965) (Warren, Ch. J.):

> One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.

See also D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904, 909-10 (1st Cir. 1958) (Magruder, J.).

56. *See, e.g.*, Frechill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966).

57. *See, e.g.*, N.D. GA. R. 10 (4 months); S.D. MISS. R., DISCOVERY (90 days); D.N.J. GEN. R. 15(A) (90 days after case is at issue); W.D.N.C. GEN. R. 10 (90 days after case is at issue); D.N.D. R. 1V(6) (45 days after opening of next preceding term of court unless issue is joined 45 days before that term begins—then at the beginning of the term); W.D. PA. R. 5(11)(c)(1) (50 days after case placed on pretrial list). *Compare* S.D.N.Y. CIV. R. 4. Some rules differentiate among types of actions. *See, e.g.*, D. KAN. R. 14(a) (4 months except for patent infringement and antitrust cases, where 8 months are allowed); E.D.N.C. CIV. R. 7(e) (4 months after issue except for patent, antitrust, and trademark cases, where 8 months is granted); W.D. TEX. R. 26(e) (3 months after issue except for patent, anti-trust, and trade mark cases, where 6 months is allowed).

differences in the times allotted by the rules themselves suggest that it is not possible to predetermine accurately how much time is reasonable in particular classes of cases. Although all these local rules provide for additional discovery upon some kind of showing of "good cause," this probably does little to ameliorate the situation. A strong necessity must usually be shown,[58] and often a litigant will find adherence to the rule, with whatever prejudice or oppression it causes him, the safest course. Thus the time limits embodied in local rules are made effective in the bulk of cases—although Rule 30(d), conferring on the district courts a circumscribed power to limit or terminate discovery, clearly contemplated no such wholesale limitations.[59] Undoubtedly, the time limits are promulgated with the salutary purpose of preventing needless delay, but the same end could be more efficiently and more fairly achieved if judges would give their attention separately to individual cases. The rule-making approach saves judicial time and effort at the expense of the policies behind the federal discovery rules.

Some district courts have gone still farther in attempting to control by local rule the time available for discovery. Federal Rule 26 provides that the plaintiff shall not begin taking depositions sooner than 20 days after the commencement of the action, unless he obtains leave of court. Two districts have simply granted the necessary leave in a rule applicable to all cases.[60] Surely such an extreme violation of the clear purpose of 20-day limitation is invalid on its face as "inconsistent" with Rule 26. Perhaps more defensible are a number of local rules providing that, unless the court is persuaded beforehand to hold otherwise, five days shall be the "reasonable notice" of oral depositions required by Federal Rule 30(a).[61] There is perhaps room for a general guide as to what is usually reasonable, as long as district courts do not shirk the task of deciding reasonableness with reference to the facts of each case. Still, such rules do not seem to be the sort of necessary regulation contemplated by the authors of Rule 83, and the danger of inflexible application is obvious; in some cases, five days' notice will simply not be enough.[62]

Apart from time limits, district courts have promulgated various rules restricting the freedom to pursue, and the substance of, pre-trial discovery. The Eastern District of Pennsylvania has gone so far as to dictate an approved set of interrogatories to be used in personal injury litigation. They are required in "appropriate cases" and "unless the circumstances are truly ex-

58. *E.g.*, E.D. & W.D. Ark. R. 9(e) (exception only "to prevent manifest injustice"); W.D.N.C. Gen. R. 10 (exception only for the "exceptionally difficult case").

59. The procedure and requirements for a 30(d) motion specifically enumerated within the Rule, and its tone strongly suggest that a "special" rather than a "standing" order is contemplated. See text accompanying notes 26-29 *supra*.

60. E.D. Okla. R. 14; W.D. Okla. R. 14.

61. *See, e.g.*, D. Colo. R. 10(a); D. Kan. R. 14(b); D.N.M. R. 8(a); E.D. Okla. R. 14; N.D. Okla. R. 14; W.D. Okla. R. 14.

62. *See* Mims v. Central Mfrs. Mut. Ins. Co., 178 F.2d 56, 59 (5th Cir. 1949). *See also* Kilian v. Stackpole Sons, Inc., 98 F. Supp. 500, 506 (M.D. Pa. 1951).

ceptional," any objection to them will be overruled.[63] And a rule in the Southern District of New York,[64] upheld in 1954 by the Second Circuit,[65] provides for the discretionary imposition of costs upon a party prior to his taking a deposition more than 100 miles from the courthouse.[66] The rule was held to be a valid supplement to Federal Rule 30(b) as a protection of a party "from annoyance, embarrassment, or oppression." But once again, it seems these values might be better served by a retail than by a wholesale approach. To measure oppression in miles, without regard for such other factors as the relative financial means of the parties, seems hopelessly arbitrary; the effect of the rule may be to prevent an impoverished litigant from taking an important deposition. It would be more consistent with the larger aims of federal procedure—though, again, it would involve more work for judges—to determine from the facts as they come up whether one whose deposition is to be taken will really be annoyed, embarrassed or oppressed. A similar case-by-case approach should be substituted for rules which limit the substantive scope of discovery beyond the exception made in the Federal Rules for privileged material.[67]

In sum, a large number of local rules relating to pre-trial discovery are objectionable in that they fail to respect the intentions of the draftsmen of the Federal Rules, and particularly the purposes of Rule 83. A number of rules relating to other areas are similarly objectionable, as will be seen below. Arguably, these rules are invalid as "inconsistent" with the Federal Rules within the meaning of Rule 83—though the inconsistency is in most cases rather subtle. If the rules are invalid, the question is raised what an appellate court can and ought to do about them.

III. Judicial Approaches to Local Rules

It is peculiarly difficult to bring the issue of a local rule's validity before an appellate court. One simple reason is that a bad rule may not be quite bad enough. Most of the possibly invalid rules can be obeyed, though at some inconvenience or expense, and in general only a foolhardy lawyer would, by defying such a rule, invite an unfavorable ruling which might or might not be reversed on appeal. On the other hand, whatever prejudice one suffers by

63. E.D. Pa. R., Interrogatories Approved for Asking in Appropriate Cases, noted in Comment, 1966 Duke L.J. 1011, 1048-49. *See* Pankola v. Texaco, Inc., 25 F.R.D. 184 (E.D. Pa. 1960).

64. S.D.N.Y. Civ. R. 5.

65. *See* North Atlantic & Gulf S.S. Co. v. United States, 209 F.2d 487 (2d Cir. 1954). Also see Moore v. George A. Hormel & Co., 2 F.R.D. 340 (S.D.N.Y. 1942), upholding the validity of the same rule.

66. At the time the rule was upheld the limit was 150 miles.

67. *But see* W.D. Pa. R. 5(II)(G), as construed in Bogatay v. Montour R.R., 177 F. Supp. 269 (W.D. Pa. 1959).

complying with a local rule may not be enough to justify reversal of a judgment otherwise free from error.[68]

Even where a litigant has been seriously harmed by a district court's following a dubious rule, it is by no means certain that the rule will be reviewed. Often the dispute focuses on the court's order, rather than the local rule which prompted it. This is particularly likely where the local rule provides for the exercise of some final discretion by the trial judge, as do, for example, most pre-trial rules. Then the trial judge's decision is likely to be viewed not as the application of a rule, but as a decision on the facts of a case and therefore subject to extremely limited review[69]—regardless of the actual influence of the rule upon the judge's decision. Even where the rule appears mandatory, its application may be held to be a discretionary decision by those courts which do not require a court to follow its own rules.[70] And many district courts have achieved a similar effect by granting trial judges the power to modify local rules "to meet emergencies or avoid injustice or great hardship."[71] The trouble is that, though individual applications of local federal rules can often be made to look like discretionary decision-making, the rule itself is likely to have played a large role in shaping the decision. Indeed, the very existence of a rule will naturally lead parties to conform to its dictates; its absence might allow them to take full advantage of the opportunity for

68. For example, the costs for taking a deposition at a distance of more than 100 miles from the courthouse, see text accompanying notes 65-66 *supra*, must be paid prior to taking the deposition. If the party who originally paid wins the case, he will be reimbursed. If he loses, to get a reversal on the basis of the local rule, he would have to prove that the costs prevented him from taking a deposition, that said deposition was crucial to his case, and that he brought this to the attention of the judge who then imposed the costs because of the local rule and not because of Federal Rule 30(b).

69. *See, e.g.*, Bardin v. Mondon, 298 F.2d 235 (2d Cir. 1961); Sykes v. United States, 290 F.2d 555 (9th Cir. 1961); McMullin v. Sheehan, 95 F.2d 129 (8th Cir.), *cert. denied*, 305 U.S. 607 (1938).

70. The cases are split on the binding force of a local rule on the judges in the district. In a pre-Federal Rules case, Superior Fire Ins. Co. v. Martin, 80 F.2d 275 (7th Cir. 1936), the court held that a local calendar rule "must be applied to all cases which come within its provisions until it is repealed by the authority which made it." *Id.* at 277. This position has support in Rule 83 cases. *See* Smithson v. Callahan, 141 F.2d 13 (D.C. Cir. 1944); Avins v. New York Post Corp., 185 F. Supp. 511 (S.D.N.Y. 1960).

In other cases, particularly where the local rule clearly applied, the courts have refused to follow the local rule where prejudice would result. *See, e.g.*, Hayden v. Chalfant Press, Inc., 281 F.2d 543 (9th Cir. 1960); Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses, 96 F.2d 30 (8th Cir. 1938). *See also* United States v. Bradford, 238 F.2d 395 (2d Cir. 1956) (criminal case). The extreme position was taken by the judge in Frankel v. Alan Wood Steel Co., 31 F.R.D. 284, 287 (E.D. Pa. 1962), who proclaimed: "This Court which adopted said Rule has the inherent power to suspend its operation if justified by the particular facts of the case." The statement goes a little far since "this Court" represented only one of the eleven judges in the Eastern District, *see* 28 U.S.C. § 133 (1964); however, the decision was correct as no party was prejudiced by the waiver and one party would have been seriously harmed because of a technicality if the rule had been followed.

71. *See* D.N.M. R. 23. *See also, e.g.*, E.D. Ill. R., General; D. Kan. R. 30; D. Me. R. 1(b). *Compare* Fed. R. Civ. P. 16, which grants the power to modify pretrial orders "to prevent manifest injustice." Such local rules are clearly within the spirit of similar grants of discretion within the Federal Rules, *see, e.g.*, Rules 30(b), (d); 31(d); 41(b); and within the mandate of Fed. R. Civ. P. 1 to seek a just determination of every case on its merits. *Cf.* Woodham v. American Cystoscope Co., 335 F.2d 551 (5th Cir. 1964).

experiment and reliance upon the unfettered discretion of the trial judge contemplated by the Federal Rules.

When courts, despite all obstacles, do confront the issue of a local rule's validity, they often do not perform well. Some simply ignore Rule 83.[72] When new problems arise they look to the Federal Rules, to precedent, to federal statutes, and to state law for solutions, bypassing the Rule 83 decision-making power, overlooking the hope of the draftsmen of the Rules that federal courts would fashion a new and independent body of procedural precedent. Other courts evaluate a local rule by examining only its consistency with the particular Federal Rule it was designed to supplement. Usually only clear conflicts between the two are sought. This approach is occasionally expanded to include a weighing of the policies behind the Federal Rule.[73]

Some decisions do show an awareness of the general policies embodied in the Federal Rules and attempt to weigh local rules in the light of the quests for uniformity, simplicity and scarcity, as well as in the light of a single rule.[74] Many courts invoke the language of Federal Rule 1 as expressing the guiding principles behind Rule 83,[75] or simply discuss whether the local rule is an appropriate one for federal courts. Even these courts continue to merge the local rule into the decision implementing it, failing to give any weight to the intended rule-decision distinction embodied in Rule 83.[76]

In most cases, the approach of these latter courts is probably sound, but it needs to be supplemented. Reversal may be too harsh a result where a decision, fundamentally fair in itself, happens to be consistent with an invalid local rule. But where an appellate court thinks a rule out of harmony with the purposes of Rule 83 and the Federal Rules generally, it ought to say so unequivocally. Such a statement, even if only dictum, would probably free future litigants from the local rule's influence. The free use of dictum may often be the only effective way for appellate courts to act against the excessive use of the rule-making power.[77] But where a decision is obviously a mechanical

72. *See, e.g.*, Bose v. 39 Broadway, Inc., 80 F. Supp. 825 (S.D.N.Y. 1948); Fontenot v. Cabot Carbon Co., 78 F. Supp. 659 (W.D. La. 1948); Sutton v. Great Lakes Greyhound Lines, Inc., 51 F. Supp. 715 (W.D. Ky. 1943); *cf.* United States v. Certain Land in the City of Poughkeepsie, 71 F. Supp. 363 (S.D.N.Y. 1947).

73. *See, e.g.*, Sykes v. United States, 290 F.2d 555 (9th Cir. 1961).

74. *See, e.g.*, Yale Transport Co. v. Yellow Truck & Coach Mfg. Co., 3 F.R.D. 440 (S.D.N.Y. 1944).

75. *See, e.g.*, Woodham v. American Cystoscope Co., 335 F.2d 551, 557 (5th Cir. 1964).

76. *Compare* Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939 (5th Cir. 1964) *with* Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524 (M.D.N.C. 1967).

77. Rule 83, unlike its immediate predecessor Equity Rule 79, quoted *in* note 11 *supra*, does not provide for pre-promulgation review of local rules by the federal courts of appeal, although it does require that copies of local rules be sent to the Supreme Court. This change from the Equity Rule procedure was intended to allow the district courts more freedom in establishing their own procedure:

> The [Advisory] Committee entertained the view that as the district judges are the ones to operate under the local rules they should have the final determination subject to modification by the Supreme Court. . . .

A.B.A. PROCEEDINGS, *supra* note 4, at 357. Although this factor has never been mentioned

application of a bad rule, an appellate court should not respect the fiction that the court below has exercised its discretion merely because it could theoretically have decided otherwise.

Decisions in three procedural areas illustrate the various ways in which courts have approached the problems raised by Rule 83, and how these approaches might be improved.

A. *Security for Costs*

The question of whether a plaintiff should be required to post security from which the costs of an action may later be satisfied has sometimes been dealt with by ad hoc decision, sometimes by a local rule—one giving general guidance or one addressed specifically to the problem. In their reactions to the problem, courts have shown only sporadically an appreciation of the balance between rule-making and decision-making intended by the authors of the Federal Rules.

The court in *Trophy Productions, Inc. v. Sperling*[78] analyzed a defendant's motion for security without the benefit of a local rule on point. After deciding that a California state statute on costs was not binding on a federal court,[79] the judge reviewed cases in which district courts had applied California law on other procedural questions[80] and still found no help. He concluded that without a local rule, statute, or decision of a "reviewing court" that required the plaintiff to post security for costs, "it is my view that I have no power to require it."[81] The decision simply ignores the last sentence of Rule 83, which is directed expressly to cases where controlling rules or precedents are absent. By contrast, other courts have made the precise mistake the *Sperling* court worked so hard to avoid. While recognizing that the decision-making power of Rule 83 was operative where no other rule existed, these courts have followed compulsory local rules providing that state law applies when there is no other governing law.[82] Such an approach not only

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in a decision on local rules, it may operate to restrict somewhat the degree to which the circuit courts will review them. An appellate court should never void a local rule simply because it would prefer that another procedure be used. However, the appellate court should not allow local rules inconsistent with the Federal Rules to survive on the ground that the district judges passed them.

78. 17 F.R.D. 416 (S.D. Calif. 1955).

79. *See* CAL. CIV. PRO. § 1030 (West 1955). If the California law had been "substantive," the court would have been required to follow it. *See* Cohen v. Beneficial Loan Corp., 337 U.S. 541, 555 (1949). In *Cohen*, a New Jersey statute requiring security in stockholder's derivative suits was held to be "substantive." The California law requires security in all cases where the plaintiff is a non-resident or a foreign corporation.

80. The leading case in the court's opinion was Jefferson v. Stockholders Publishing Co., 194 F.2d 281 (9th Cir. 1952), where a lower court was reversed for requiring a plaintiff in a libel action to file a bond before summons would issue under Federal Rule 4(a).

81. 17 F.R.D. at 419-20. For a similar case see Altman v. National Life Ass'n, 37 F. Supp. 414 (W.D. Pa. 1941).

82. See cases cited in note 72 *supra*. In Bose v. 39 Broadway, Inc., 80 F. Supp. 825,

ignores the intent of Rule 83 to vest decision-making power in the individual judge, but enforces a local rule which is directly contrary to one of the major purposes of the Federal Rules: to establish a uniform federal practice superseding the Conformity Act.[83]

A few courts, forced to decide on motions for security without a local rule to guide them, have accepted the full burden of discretion which the decision-making power of Rule 83 places upon them, avoiding the alternatives of ignoring that power altogether or resorting to mechanical solutions. They have looked to the policies usually underlying requirements of security for costs and have applied them to the facts of the pending case.[84] In the exercise of their discretion, such courts have often required that the defendant show good cause why security is necessary.[85] This use of the decision-making power is obviously a sensible response to problems to which no valid rule provides a solution.

But the natural response of the district courts to repeated motions for security for costs was to pass local rules on the subject.[86] These rules, now in force in most districts, are of three general types: plaintiff must give security of a given amount upon filing his complaint,[87] plaintiff is required to give security except for good cause shown,[88] or plaintiff need post security only upon a motion by the defendant.[89] Whether these local rules are a proper use of Rule 83 is open to question; surely, those which leave wide latitude for the parties and the ultimate discretion of the judge are preferable. Despite the prevalence of relevant rules, appellate courts often do not pass upon them, inquiring rather into the reasonableness or necessity of requiring security in

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827 (S.D.N.Y. 1948), the court held that "the State rule governs in default of some provision covering it in the Federal Rules."

In the Cleveland Symposium, Chairman Mitchell emphasized that the decision-making power abolished mandatory references to state law:

> [District judges] may follow the state practice, if they think that is an adequate one . . . but the Conformity Act does not fill the gap. The district judges fill it.

CLEVELAND INSTITUTE, *supra* note 4, at 189.

Many districts still have local rules giving the judge discretion to follow state law if no Federal Rule or statute is on point. *See, e.g.*, N.D. ILL. CIV. R. 19; D.N.J. GEN. R. 44; E.D.N.Y. CIV. R. 15; S.D.N.Y. CIV. R. 15.

83. See note 25 *supra*.

84. *See, e.g.*, Newell v. O.A. Newton & Son Co., 95 F. Supp. 355 (D. Del. 1950) (motion for security denied because the circumstances did not warrant it). *See also* State Wide Enterprises, Inc. v. United States Gypsum Co., 238 F. Supp. 604 (E.D. Mich. 1965).

85. National Distillers Prods. Corp. v. Hindech, 10 F.R.D. 229, 230 (D. Colo. 1950) (defendant's motion based upon Colorado law denied with leave to reapply with a statement of good cause).

86. The Knox Report at 49-52 recommends local rules be adopted in this area.

87. *See, e.g.*, E.D. VA. R. 21(2). *See also* E.D. & W.D. ARK. R. 4(b). *Compare* Jefferson v. Stockholders Publishing Co., 194 F.2d 281 (9th Cir. 1952), discussed at note 80 *supra*.

88. *See, e.g.*, N.D. GA. R. 7; E.D. ILL. CIV. R. 2.

89. *See, e.g.*, D. CONN. R. 6; D. IDAHO R. 7. *See also* D. COLO. R. 19, security at discretion of court after motion by defendant.

each case.[90] This is especially common where there is a clear risk of abuse by the defendant.[91]

Farmer v. Arabian American Oil Co.,[92] decided in 1960 by the Second Circuit, provides a rare example of an appellate court's going beyond the specific problem before it to question the local rule itself. A rule of the Southern District of New York requiring non-residents to post security was criticized by Judge Charles Clark, a jurist uniquely qualified to comment on federal procedure. According to Judge Clark:

> There does not seem justification for a court of the United States to put an arbitrary and unbending clog on suits by one of its own citizens because he does not have the good fortune to live in New York. And the seeming compulsion found below for a bond for any non-resident for even a de luxe form of trial is hardly to be justified as a local rule within the limited authorization of F.R. 83 . . . .[93]

However, Clark felt that a local rule which was discretionary—both as to the amount and the fact of imposition of security—was proper.[94] In other words, if the trial court felt it should publish a warning to the parties that security for costs might be required, then it could do so, but it should not avoid by a local rule the burden of making the decision. It is unfortunate that so few appellate judges have emulated Judge Clark's sophisticated approach to problems raised by Rule 83.[95]

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90. *See, e.g.*, Leighton v. One William St. Fund, Inc., 343 F.2d 565 (2d Cir. 1965); Russell v. Cunningham, 233 F.2d 806 (9th Cir. 1956).

91. *See, e.g.*, Leighton v. One William St. Fund, Inc., 343 F.2d 565 (2d Cir. 1965).

92. 285 F.2d 720 (2d Cir. 1960). The security was required by then S.D.N.Y. Civ. R. 2(a).

93. *Id.* at 722. Judge Clark added:

> The over-all discretion of the district courts, however, which appears to be restated in local rule 2(b) should be adequate authority for such orders as to security as will facilitate, not hamper, the administration of justice. *Id.*

The present rule, S.D.N.Y. Civ. R. 2, is apparently the result of this judgment by Judge Clark.

Clark's comment on the "seeming compulsion" manifested by the trial court might well apply in other cases where the local rule, although written in a discretionary vein, is applied as if mandatory. See cases cited at note 72 *supra*. *See also* Pankola v. Texaco, Inc., 25 F.R.D. 184 (E.D. Pa. 1960). On defendant's objections to interrogatories, the judge sustained the objections, citing as the most important ground the fact that the interrogatories did not conform to a suggested list of 70 interrogatories promulgated as an appendix to the local rules. There is no indication in the appendix that the interrogatories were mandatory, and, if they are, the rule is clearly contrary to Federal Rule 31. Whether the result of "Gresham's law," see note 37 *supra*, or human nature, the blind adherence to local rules occurs often enough to render the presence of discretion immaterial in judging the validity of a rule, unless it is clear that the rule has not become an excuse from decision-making in practice.

94. *Cf.* Clair v. Philadelphia Storage Battery Co., 29 F. Supp. 299 (E.D. Pa. 1939), where the court denied a motion for security even though it viewed its local rule as mandatory, holding that the defendant waived its right to security by waiting until trial to request it. The court felt that to impose the burden of supplying security at such a late date would be inequitable.

95. The same type of issue as to the decision-making power of district courts is presented by local rules which provide for abatement of an action when a plaintiff has failed to perfect service within a specified time. *See* D. Ariz. R. 7 (1 year); N.D. Ga. R. 21 (wilful failure to serve within 60 days); D. Me. R. 7 (3 months—then 30 days notice to show good cause); W. D. Wash. Civ. R. 20(c) (3 months—unless good cause

B. *Time of Entry of Judgment*

Before the 1963 amendments to Federal Rule 58, there was no certain way to judge at what point in an action the court's final judgment had been entered, when the judge had made two or more decisions or orders that clearly stated the outcome of the case.[96] Under Rule 73, the time for filing an appeal began to run from the "entry of judgment"; disputes inevitably arose about when this phenomenon occurred. At the same time there existed several local rules describing the manner in which judgments were to be recorded or orders from the bench to be interpreted. It is not clear why these rules were passed. Perhaps they were intended simply to delineate a suggested procedure or to codify existing practices. More likely, they were meant to resolve, by embellishing Rule 58, the dilemma over when the time for appeal began; at least, several litigants chose so to interpret them when the issue arose. Circuit court decisions on the timeliness of appeal range from total or

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is shown). *See also* Woodham v. American Cystoscope Co., 335 F.2d 551 (5th Cir. 1964), discussed at note 59 *supra*. The propriety of such rules has been seriously questioned, especially since the Advisory Committee rejected a similar limitation on the time for service. *Compare* U.S. SUP. CT., PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE, Rule 3, with U.S. SUP. CT., REPORT OF THE ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE 4 n.4 (1937).

In Schram v. Koppin, 35 F. Supp. 313, 314 (E.D. Mich. 1940), the court felt that the intent of Federal Rule 4(a) may well have been that in a disputed case "the question of due diligence might be decided by the court." If this were so, "[i]t might even be argued that there is some doubt of the right of the district to put a limitation on the time within which a writ issued must be served. Might this not be 'inconsistent' with the intent of the new rules." *Id.* at 314. The court then decided the case upon its particular facts.

Judge Clark had occasion to speak to this problem in Hackner v. Guaranty Trust Co., 117 F.2d 95, 99 n.1 (2d Cir. 1941). If the intent of the local rule were "to abate an action three months after its commencement, even though plaintiff has been diligent, its validity is to be questioned under Federal Rule 83 . . . ." *But see* Truncale v. Universal Pictures Co., 82 F. Supp. 576 (S.D.N.Y. 1949), where such a local rule was upheld, plaintiff's arguments that the rule was inconsistent being dismissed without discussion.

Because of the various factors which can attend a failure to serve process within, say, three months, the reasoning in Schram v. Koppin, *supra*, that the absence of a time limitation in the Federal Rules places the burden of decision upon the trial judge, appears to be valid. The problem of what the absence of a provision means is, of course, a difficult one to resolve. *See, e.g.*, Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co., 3 F.R.D. 440 (S.D.N.Y. 1944).

The danger remains, however, that a local rule in which limitations such as time or content are *suggested* might take on the force of a mandatory rule and thereby replace the decision-making process with a formula. See note 93 *supra* and notes 118-26 and accompanying text *infra*.

96. Rule 58, before it was amended in 1963, stated:

> Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 40. When a court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry . . . .

FED. R. CIV. P. 58, 329 U.S. 862 (1946).

excessive deference to local rules, to indifference to their existence, to careful weighing of their desirability within the Federal Rules system.

In *J. E. Haddock, Ltd. v. Pillsbury*,[97] the trial judge had made a dispositive order in March and signed a judgment in August. The clerk had recorded both on the civil docket. An appeal was filed, which was too late if the March order constituted a final judgment but was timely if August was the relevant date. On a motion to dismiss the appeal, the Ninth Circuit held the March order to be a final judgment solely because a local rule required that no judgment or order "will be noted in the civil docket until the Clerk has received from the Court a specific direction to enter it."[98] Because the judge had signed both orders, as provided in the local rule, each one was a final order. Without questioning whether the local rule was meant to have this effect, whether if so the rule was a legitimate attempt to experiment within the confines of a badly drafted Federal Rule, or whether it was the purpose of Rule 58 to make the acts and intentions of the trial judge, rather than any local rule, controlling, the court concluded that the "requisite of a direction for the entry of a judgment is a proper provision and carries out F.R.C.P. Rule 58 . . . ."[99] Its deference could hardly have been less critical.[100]

In *F & M Schaefer Brewing Co. v. United States*,[101] the trial judge had handed down his decision in a memorandum opinion on April 14 and had signed a formal judgment on May 24. The Government filed notice of appeal 96 days after the decision and 58 days after the signing of the formal judgment; the Federal Rules imposed a 60-day limit. Judge Clark, for the Second Circuit, held the appeal not timely under Rule 73(a). Although describing the decisive issue as the "reflection of the trial judge's state of mind"[102] when he handed down the orders, Clark also invoked a local rule which directed the clerk to treat memorandum opinions as final orders, stating that this rule advanced the "purpose" of Rule 58.[103] The opinion is less satisfying than one would expect of its author. If the relevant question was which action made the trial judge's thought sufficiently clear, how could the existence of a local

97. 155 F.2d 820 (9th Cir.), *cert. denied*, 329 U.S. 719 (1946).
98. *Id.* at 822 (quoting from N.D. CAL. R. 5(3)).
99. *Id.*
100. *Cf.* Bagby v. United States, 199 F.2d 233 (8th Cir. 1952), where summary judgment without oral argument was affirmed because a local rule provided for requests for oral argument and the defendant failed to comply with this rule. *Compare* Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964), in which the local summary judgment rule failed to provide for a method of requesting oral argument. The Court of Appeals examined not only the lower court's decision but also the local rule and the relevant federal procedure policies in holding the decision erroneous and such application of the local rule invalid:

> . . . having in mind that the granting of such a motion disposes of the action on the merits, with prejudice, a district court may not, by rule or otherwise, preclude a party from requesting oral argument . . . .

Id. at 461-62.
101. 236 F.2d 889 (2d Cir. 1956) (en banc), *rev'd*, 356 U.S. 227 (1958).
102. *Id.* at 892.
103. *Id.*

rule affect the answer? Probably cognizant of this difficulty, Clark subsequently wrote that he had "viewed the local rule as merely corroborative of the practice actually required by F.R. 58 . . . ."[104] He reiterated that "the issue always turns on the trial judge's declared intent as to the judgment . . . ."[105]

Following this clarification, the Supreme Court reversed *Schaefer*,[106] largely disagreeing with Clark on the factors relevant to a determination of the judge's intent and fully agreeing that the sole issue was whether the judge had clearly declared his intention that his action be considered a final judgment.[107] This holding seems to imply that the local rule could have no useful function. It could hardly declare in advance an individual judge's intention, nor could it prefer other evidence of that intention to that adopted by the Supreme Court. Nevertheless, both the Second Circuit and the Supreme Court passed up the opportunity to criticize overindulgence in rule-making.[108] Such neglect can only encourage district courts to rely on prefabricated solutions rather than analysis in dealing with unresolved problems.

Other cases have taken more useful approaches. The Ninth Circuit in *Steccone v. Morse-Starret Products Co.*[109] held that a memorandum opinion of a trial judge was a final judgment even though a local rule directed the losing party to submit the form of judgment to the court. It said the judge could make a final order by any means he chose, regardless of the specifications of the local rule. In *Swan v. Board of Higher Education*,[110] the district judge had granted a dismissal, but the clerk had failed to comply with a local rule under which he was required to formalize the order of dismissal into a final judgment. Plaintiff argued that there was thus no final judgment of dismissal and that he was entitled under the former Rule 15(a) to amend his complaint without seeking leave of the court or giving notice. Rather than interpreting the local rule, the Second Circuit looked directly to Federal Rule 15 and found that the result sought by the plaintiff would not accord with the purposes of that Rule. Since the local rule would not advance these purposes, it was given no weight. The critical examination of local rules in the context of the Federal Rules is distinctly preferable to the methods used in *Haddock* and *Schaefer*. But the obstacles to full-fledged judicial review of local rules are not easily overcome. In both *Steccone* and *Swan*, the local rules survived.[111]

104. Matteson v. United States, 240 F.2d 517, 518 (2d Cir. 1956). *See* United States v. Higginson, 238 F.2d 439 (1st Cir. 1956), which was handed down between the two Clark decisions and prompted Clark's clarification in *Matteson*.

105. Matteson v. United States, 240 F.2d 517, 518 (2d Cir. 1956).

106. 356 U.S. 227 (1958). Justice Whittaker wrote the majority opinion; Justice Frankfurter, joined by Justice Harlan, dissented.

107. *Id.* at 232. *Cf.* Century Indem. Co. v. Wilson, 303 U.S. 213 (1938).

108. *See* 356 U.S. at 230 n.2, 246 n.3.

109. 191 F.2d 197 (9th Cir. 1951).

110. 319 F.2d 56 (2d Cir. 1963).

111. The problems inherent in the entry of judgment under the unamended Rule 58

C. *Dismissal for Want of Prosecution*

Several districts have local rules providing for dismissal of suits that have been inactive for specified periods of time, often six months.[112] Opinions dealing with these rules are disturbingly inadequate, especially in view of the ease with which the problem might have been treated more appropriately.

Although the Federal Rules nowhere provide for involuntary dismissals other than on the defendant's motion, it is settled that a district court's inherent power, "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs . . ."[113] enables it to dismiss a case *sua sponte* for want of prosecution. It is by no means clear, however, that this power can be exercised by the ministerial application, by a judge or, still worse, by a court clerk, of a rule predetermining the amount of inactivity an attorney may be allowed before his client will be penalized. On the contrary, it seems especially unfortunate that rule-making has been allowed to replace decision-making in this area. Rule 41, dealing with dismissal generally, clearly seems to contemplate the involvement of the judge in the dis-

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and the *Shaefer* case led the Advisory Committee to redraft the Rule entirely. FED. R. CIV. P. 58, as amended in 1963, states:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (a) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. . . . Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Numerous districts have already passed local rules which supplement or modify amended Rule 58. Many of these rules are directly contrary to the final sentence of Rule 58. *See, e.g.*, D. ARIZ. R. 22; E.D. & W.D. ARK. R. 12; C.D. CAL. R. 7(a); S.D. CAL. R. 7(a); D. IDAHO R. 18(a); D. MONT. R. 11(b); D.N.H. R. 13; N.D. OHIO R. 4; E.D. OKLA. R. 23(a); N.D. OKLA. R. 23(a); S.D. W.VA. R. 9; D. WYO. R. 21(e). *Compare* S.D.N.Y. GEN. R. 10, in which the Clerk is directed to prepare the form of judgment and submit it to the judge for approval. A note to the rule explains that the Clerk is to prepare the judgment form to avoid delay. Local rules which direct the attorney to submit the form of judgment were probably passed with the same end in view. If the burdens on judicial time are so great as to make the procedure in Rule 58 impractical, the proper recourse is amendment. The Rule is too explicit to be modified by local rule.

Such an amendment by local rule of a Federal Rule which clearly calls for modification by special order only is not unique. For instance, Federal Rule 51 directs that jury instructions may be filed "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs . . . ." Several districts have passed rules which require instructions be filed five days before the trial begins. *See, e.g.*, C.D. CAL. R. 14; D. IDAHO R. 15. In addition, several other rules require filing at the opening of trial. *See, e.g.*, D. ARIZ. R. 20; D. KAN. R. 19. Failure to comply with these rules can result in the refusal of the instructions without regard to their merit. *See, e.g.*, D. ARIZ. R. 20. Even if the words "during the trial" are overlooked it is hard to see how these rules can be reconciled with the direction that the judge may "reasonably direct" the time. Such a provision clearly calls for a special order of the court rather than a local rule. See text accompany notes 26-29 *supra*.

112. *See, e.g.*, D.D.C. R. GEN. 13; S.D. FLA. GEN. R. 9; N.D. GA. R. 21; N.D. ILL. GEN. R. 21; W.D. MICH. GEN. R. 8; D. MINN. R. 3(3); D.N.J. GEN. R. 30; E.D.N.Y. GEN. R. 23; E.D. GEN. WASH. R. 11.

113. Link v. Wabash R.R., 370 U.S. 626, 630 (1962).

missal process. More broadly, one of the central policies of the Rules is to favor decision of cases on their merits—a policy which mechanical dismissals for want of prosecution obviously defeat.[114] Local rules directing dismissal after expiration of a specified time are not the sort of rule contemplated by the draftsmen of Rule 83.

Nevertheless, such rules have often been justified as resting on a power "inherent and independent of any statute or rule."[115] Whether because of the harshness of the penalty or the rigidity of local dismissal rules, however, appellate courts have recently been insisting that the judge exercise his discretion before applying those rules. At the same time, these courts have avoided attacks on the source of erroneous lower court decisions—the local rules themselves.

Sykes v. United States[116] illustrates this approach. The suit had been dismissed pursuant to a local rule that required the clerk of the court to draw up a list every six months of those cases which had been inactive for more than six months. Notice was to be mailed to the dilatory attorneys and if they did

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114. What to do with inactive cases is part of the larger problem of what sanctions should be imposed to enforce the procedure of the district court—a problem, which the enlightened use of Rule 83 may help solve. The issue becomes particularly acute when the attorney for a party has wilfully violated an order or rule of the court rather than negligently let a case go stale. Such sanctions as dismissal, *see* Link v. Wabash R.R., 370 U.S. 626, 636-49 (1962) (dissenting opinion of Justice Black), and preclusion, *see* Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961), are extremely harsh upon the client. The harm is alleviated when it is the client's decision to violate the order, but, even then, great care must be taken to avoid injustice. *See* Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939 (5th Cir. 1964).

Usually, the decision is not the clients'. Thus, courts have had to explore means of regulating the offending counsel directly. The district courts are empowered to impose compensatory fines under 28 U.S.C. § 1927 (1964) if an attorney has unreasonably created excess costs. These fines are apt to be small, however, as shown by fines imposed for incurring excess costs in the discovery area, *see, e.g.*, United Sheeplined Clothing Co. v. Artic Fur Cap Corp., 165 F. Supp. 193 (S.D.N.Y. 1958) ($50); Austin Theater, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302 (S.D.N.Y. 1958) ($50); Maresco v. Lambert, 2 F.R.D. 163 (E.D.N.Y. 1941) ($25). At the other end of the scale, disharment or criminal contempt under 18 U.S.C. § 401 (1964) are too severe to warrant consideration in almost all cases.

The search for a proper sanction led many courts to consider the use of non-compensatory fines levied upon the offending counsel. This sanction was held outside the power of the district courts in Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.) (en banc), *cert. denied*, 371 U.S. 888 (1962). The majority opinion held that Rule 83 did not "extend to basic disciplinary innovations requiring a uniform approach," and that the district courts were limited to contempt proceedings when imposing a non-compensatory fine. *Id.* at 732. This decision not only denies to the district courts the use of an excellent sanction, see Mellvaine, *A District Judge's Views as to the Means of Insuring Compliance by Counsel with the Pretrial Procedures*, 29 F.R.D. 408 (1962), but also, and more importantly, severely restricts the scope of district court action under Rule 83, whether by written or oral rule. The basic or non-basic nature of a local rule is not a meaningful distinction or useful guideline. Such issues as the intended exclusivity of the Federal Rules, the contribution of the local rule to the proper working of the Federal Rule it allegedly supports, the underlying policies of both the local and Federal Rules, and the appropriateness of the sanction in the particular case are all left unexplored. Such rather mechanical restrictions of the Rule 83 powers can severely hamper the district courts and do as much harm to the goals of the Federal Rules as decisions permitting the use of bad local rules.

115. Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F.2d 825, 826 (10th Cir. 1948).

116. 290 F.2d 555 (9th Cir. 1961).

not appear their cases could be dismissed. Plaintiff's action was dismissed because he had not acted for six months and 28 days. The Ninth Circuit held that failure to vacate the dismissal was an abuse of discretion because there was no evidence of an intent by plaintiff to abandon the case and because the policy of federal civil procedure is to decide cases on the merits. It said nothing about the validity of the underlying rule.

Clearly, however, the rule is inconsistent with the reasoning of *Sykes*. If the proper criterion for dismissal is intention to abandon, a rule that prevents consideration of each case on its facts is indefensible. The *Sykes* court should have pointed this out.

Two recent District of Columbia Court of Appeals opinions reflect the same reluctance to explore fully the implications of a reversal of the judgment below. Local Rule 13 of the District of Columbia District Court provides for automatic dismissal by the clerk if no action is taken on a case for six months. The clerk is to give the dilatory party notice after five months, but his failure to do so will not affect the judgment of dismissal.[117] The dismissal is without prejudice and the judge is assigned no role at all. In *Newberry v. Cohen*,[118] plaintiff's action for fraud was dismissed by the clerk on April 28, although on April 1 she had filed a motion to compel one of the defendants to answer interrogatories. Reinstatement of the action was denied by the judge.[119] The Court of Appeals reversed because it found that plaintiff's motion of April 1 was "action" within the meaning of local rule 13. The court went on to say that "[t]he Clerk may be given the ministerial function of noting the dismissal of an action when nothing has happened within six months, but only the informed discretion of a judge can terminate a lawsuit while a plaintiff's discovery motion is pending."[120] Surely this is excessive deference to the district court rule. There is no reason to read Rules 41 and 83 together as empowering a clerk to dismiss a case on his own motion, with no consultation with a judge, simply because he believes it has been inactive for six months.[121] And why is it that only the "informed discretion" of the trial judge will do when the situation is altered only by the presence of one request for interrogatories in that six-month period? The distinction drawn by the court has no apparent relation to any of the purposes of the Federal Rules; it does have the advantage of avoiding the problem of the local rule's validity. In short, this case reveals distinct lack of concern for the proper use of Rule 83.

117. D.D.C. GEN. R. 13(b).

118. 374 F.2d 320 (D.C. Cir. 1967).

119. *Id.* at 323. Plaintiff's action was filed on September 19, 1964 and answered by the defendants in March, 1965. In October, 1965 defendants' motion to dismiss was denied. Subsequently, plaintiff filed motions on October 11 and November 3, 1965 to compel one of the defendants to answer some interrogatories. The defendant agreed to do so on January 3, 1966. In March, 1966 the Clerk warned plaintiff of possible dismissal under local rule 13. *Id.* at 322.

120. *Id.* at 323.

121. *Compare* FED. R. CIV. P. 77(d), 79.

Zaroff v. Holmes,[122] decided three months later, employed the same technique: construing the language of an indefensible local rule in order to avoid the issue of its validity while achieving a sound result. Plaintiff's previous action had been dismissed in accordance with a local rule by the pretrial examiner, without any action being taken by any judge, when plaintiff's attorney failed to appear at a pretrial hearing. Plaintiff, unaware of the dismissal, hired a new attorney who instituted a new suit and was met with the claim that the previous judgment was *res judicata*.[123] It can hardly be seriously argued that local rules whereby pretrial examiners, without any review by the trial judge, can dismiss actions with prejudice simply because plaintiff's attorney missed a pretrial conference are valid under Rule 83. The court, however, simply characterized the issue as "a question as to the proper construction of Local Rule 12"[124] and decided, after some semantic contortions, that the rule did not contemplate a dismissal with prejudice.[125]

A concurring opinion by Judge Burger disagreed—probably rightly—with the majority's rationale. Unlike his reluctant colleagues, Judge Burger faced the more important issue:

> I reach the same result as the majority since it seems clear that Local Rule 12 is inconsistent with Rule 41(b) in providing for dismissal by pre-trial examiners and is therefore invalid. . . . I see no warrant in Rule 41(b) for establishing mechanical substitutes for the exercise of discretion contemplated by that rule or for the District Judges' abdicating their responsibility or delegating it to a non-judicial officer.[126]

This is precisely the sort of analysis that is otherwise almost totally absent from decisions involving the exercise of Rule 83 powers by district courts. Judge Burger recognized that although a rule may not be obviously inconsistent on its face with any specific Federal Rule, it may be objectionable for subtler reasons. Specifically, it may be objectionable because it provides an automatic procedure where an exercise of discretion is appropriate—because it is a usurpation of the decision-making power.

IV. Conclusion

During the thirty years since the promulgation of the Federal Rules of Civil Procedure, their simplicity and flexibility have been shown to be of great value. The main purpose of Rule 83 was to preserve these precious traits.

122. 379 F.2d 875 (D.C. Cir. 1967).

123. The common adherence to a six-month dismissal rule is hard to justify on the basis of necessity because of the wide variance in judicial business done among districts which have such a rule. Compare, *e.g.*, the business done in the District of Columbia with that done in the Minnesota District. And some of the busiest district courts—for example, that in the Southern District of New York, have one year rules. S.D.N.Y. Gen. R. 23.

124. Zaroff v. Holmes, 379 F.2d 875 (D.C. Cir. 1967).

125. *Id.* at 876-77.

126. *Id.* at 878.

The framers envisioned only limited use of the rule-making power granted by Rule 83 and emphasized the decision-making power. If the trial judges accepted their responsibilities, federal procedure would avoid becoming clogged with code-like details, and the goal of a just determination on the merits of every claim for relief would be attainable.

That goal has not yet been abandoned. But courts have failed to realize fully both the potentials and the limitations of Rule 83. They have not attempted to determine the Rule's proper place within the Federal Rules, and thus have not evolved any meaningful guidelines for the use of the powers granted therein. Federal judges, almost without exception, seem to be unaware that one purpose of the Rule's authors was to keep rule-making to a minimum.

Perhaps the broad and unfettered use of the decision-making power which was contemplated in 1938 simply cannot be achieved. Its demands on judicial energies may be too great. It may be inevitable that a flexible system will become encrusted with regulation as lawyers seek to replace doubt with certitude. But a revision of Rule 83 in order to make its purposes clearer would be of some help. So would more frequent and forthright confrontations by appellate courts with problems raised by superfluous or ill-considered rules. So would a careful and conscientious reappraisal of their responsibilities by district judges—the authors of the local federal rules.

LOCAL RULES IN FEDERAL DISTRICT COURTS: USURPATION, LEGISLATION, OR INFORMATION?

By
*Steven Flanders**

A fundamental policy choice concerning the way federal courts shall run themselves is contained in the seemingly innocuous language of rule 83 of the Federal Rules of Civil Procedure. The rule states:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.[1]

The first and third sentences of the rule provide two powers that are distinct, though related. The first sentence is self-explanatory. Each district court is empowered to promulgate local rules as it deems necessary, with the limitation that its rules be consistent with the Federal Rules of Civil Procedure.[2] The third and final sentence of the rule in-

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1. FED. R. CIV. P. 83. Rule 83 has not been amended since it became effective in 1938. *See* note 285 *infra*, for a discussion of the sparse "legislative history." *See also* notes 170 & 171 *infra*.

2. *See* Weinstein, *Reform of Federal Court Rule Making Procedures*, 76 COLUM. L. REV. 905 (1976); J. WEINSTEIN, REFORM OF COURT RULEMAKING PROCEDURES chs. I, II & V (1977) [hereinafter cited as WEINSTEIN]. The first sentence of rule 83 restates an inherent power that already had been restated in 28 U.S.C. § 2071, which grants all courts established by act of Congress the powers to prescribe rules for the conduct of their business. *See* note 39 *infra*. Analogous rules are FED. R. CRIM. P. 57, FED. R. APP. P. 47, and former GEN. ADMIRALTY R. 44 (rescinded July 1, 1966).

troduces what has come to be known as the "decision-making power."[3] Where guidance is not forthcoming in federal rules or statutes, the court may act as it deems desirable and appropriate, without regard to state statute or practice. The rulemakers of the 1930's attached great importance to this latter provision. For example, Edgar B. Tolman, Secretary of the Advisory Committee, remarked:

> That provision is, in my opinion, one of the most important and salutary in the entire set of rules. It closes all gaps in the rules. It puts an end to the whole of the Conformity Act and it permits judges to decide the unusual or minor procedural problems that arise in any system of jurisprudence in light of the circumstances that surround them.[4]

Most federal district courts have promulgated local rules in considerable numbers, often using them to provide detailed instructions concerning many aspects of their practice and the practice of law before them. Nevertheless, since the Federal Rules of Civil Procedure became effective in 1938, there has been a remarkable difference of opinion between practitioners and legal scholars about the courts' exercise of the choice rule 83 provides. Among practitioners, the flourishing of local rules has apparently occasioned little objection.[5] When federal judges meet to discuss procedural alternatives, local rules are

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3. Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1252 (1967) [hereinafter cited as Columbia Note]. Other critical commentary on local rules, referred to throughout this article, draws heavily on this distinction. Although the Columbia Note authors were not the first to distinguish the rulemaking power from the decision-making power in rule 83, the distinction might have been forgotten had they not highlighted it. *See* text accompanying note 49 *infra*.

4. ABA INSTITUTE ON FEDERAL RULES 129 (Wash., D.C. 1938) [hereinafter cited as ABA INSTITUTE (Wash., D.C.)]. During the summer and fall of 1938, three "Institutes" on the new rules were held under the auspices of the American Bar Association in Cleveland, Washington, and New York. Participants included most members of the original Advisory Committee, who made addresses and responded to questions about the rules. Major Tolman, of the Illinois Bar, was editor-in-chief of the AMERICAN BAR ASSOCIATION JOURNAL.

5. In several recent instances, lawyer committees have been established to propose a complete revision of local rules in one or more districts. None of these committees has proposed a significant reduction in the number or scope of local rules. For example, in 1977, a statewide committee was established in the two districts in Arkansas to propose local rules common to both districts. No judge or other employee of either court was on the committee, and the chief judge emphasized that the committee had an entirely free rein. The proposed rules completely revised their outdated predecessors and are far broader in scope. A similar exercise in the Northern District of California led to adoption on August 1, 1977, of new rules comparable in scope to the older ones. The work of an Iowa statewide committee is described in Blair, *The New Local Rules for Federal Practice in Iowa*, 23 DRAKE L. REV. 517 (1974). A committee for the Ninth Circuit has proposed uniform local rules for possible adoption by all district courts on many of the topics covered by present rules. E. Cleary & R. Misner, Preliminary Report: Uniform Local Rules For United States District Courts of

often the language they use.[6] Proposals are framed and exchanged in this form and great importance is attached to developing effective rules.[7] In one commentator's view, "[o]ne of the first steps a concerned court should undertake is to devise up-to-date local rules that address the current problems the court faces and provide procedures for dealing with them."[8]

On the other hand, among scholars the commentary on court rulemaking has been almost uniformly critical.[9] Professor Charles Alan Wright believes that the "[u]se by lower courts of their rulemaking power . . . is for the most part an unmitigated disaster."[10] Elsewhere, in what he has described as "the more restrained language appropriate for a treatise,"[11] Professor Wright has provided detailed views on the subject. Referring to "[t]he flood of local rules on important and controversial subjects," Professors Wright and Miller advocate imposing restrictions upon the courts' rulemaking powers:

> Unfortunately many of the products of this well-intentioned effort are either invalid on their face or intrude unwisely into areas that should be dealt with on a national basis by rules made by the Supreme Court. The great goals of a simple, flexible, and uniform procedure in federal courts throughout the nation will be seriously compromised unless an effective check is put on the power to make local rules. This might be done either by amending Civil Rule 83, and its counterparts in the Criminal and Appellate Rules, to specify those few limited areas in which local rules may be made or by requiring

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the Ninth Circuit (Mar. 2, 1979) (unpublished draft). Professors Cleary and Misner have served as reporters to the committee. *See* Appendix B *infra*.

For one practicing lawyer's broadside attack on local rules, see Caballero, *Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?* 24 FED. B. NEWS 325 (Dec. 1977) [hereinafter cited as Caballero, *Over-Exercise*] and *Proceedings of a Session of the Conference of Metropolitan District Chief Judges on Rules and Rule Making*, 79 F.R.D. 471, 484-91 (1978) (remarks of Mr. Caballero) [hereinafter cited as *Conference on Rule Making*]. *See also*, Kahn, *Local Pretrial Rules in Federal Courts*, 6 LITIGATION, Spring 1980 at 34 [hereinafter cited as Kahn]. A committee of the American College of Trial Lawyers is beginning a study of local rules from a generally critical perspective.

6. For references to local rules and related forms, see SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES, 1970-1971 (West) [hereinafter cited as SEMINARS].

7. Grady, *Trial Lawyers, Litigators, and Clients' Costs*, 4 LITIGATION, Spring 1978 at 5.

8. Schwartzer, *Beating the Trial Court Paper Chase*, 5 LITIGATION, Spring 1979 at 5.

9. *See, e.g.*, note 91 *infra*.

10. Wright, Book Review, 9 ST. MARY'S L.J. 652, 657 (1978) (WEINSTEIN, REFORM OF COURT RULEMAKING PROCEDURES).

11. *Id.*

> approval of local rules, perhaps by the Standing Committee on Rules of Practice and Procedure or its parent body, the Judicial Conference of the United States, before they may go into effect.[12]

Some years ago Professor Maurice Rosenberg, now Assistant Attorney General for Improvements in the Administration of Justice, characterized federal courts as a "procedural Tower of Babel" because of the differences between local rules. He recommended reform of local rules as a top priority for the new Federal Judicial Center, then under consideration.[13]

How are we to account for this chasm that separates the practitioners from the commentators? Have the courts simply been irresponsible in their exercise of the rulemaking power, as the commentators suggest? The purpose of this article is to analyze the district courts' exercise of their power to make local rules and to demonstrate that the courts' actions have been, more often than not, well-reasoned and beneficial. While there have been occasional abuses, the sum total of errors appears to be slight and their effects insignificant, particularly in relation to the advantages the local rules offer.

I. A Framework for Discussing Local Rules

The exercise of local rule power and the resulting proliferation of local rules have been characterized in essentially three ways. Some critics consider it a usurpation of powers that properly belong to the Supreme Court and Congress. Other critics believe the exercise of the rulemaking power represents impermissible legislation by the courts. Yet others view it as serving a useful informational purpose that could not effectively be accomplished by any other means. This divergence

12. 12 C. Wright & A. Miller, Federal Practice and Procedure § 3152, at 223 (1973) (footnotes omitted) [hereinafter cited as Wright & Miller]. *But see Conference on Rule Making*, *supra* note 5, at 491. For critical commentary, *see* Weinstein, *supra* note 2, at ch. 5; Columbia Note, *supra* note 3; Caballero, *Over-exercise*, *supra* note 5; Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 Duke L.J. 1011 [hereinafter cited as *Local Rules Survey*]. *See also* Cohn, *Federal Discovery, A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 Minn. L. Rev. 253 (1979) [hereinafter cited as Cohn]. For a defense of the courts' exercise of the rulemaking power, see Flanders, *In Praise of Local Rules*, 62 Jud. 28 (1978) [hereinafter cited as Flanders, *In Praise*].

13. *Hearings on S. 915 and H.R. 6111 before the Senate Subcommittee on Improvements in Judicial Machinery*, 90th Cong., 1st Sess. 282 (1967). The "Tower of Babel" characterization has been widely and erroneously ascribed to a different hearing where this language does not appear.

in the views of the operation of local rules can be traced to the premises from which one approaches the exercise of local rule power.

Wright and Miller criticize local rules practice because, in their view, the federal trial courts have effectively usurped powers of the Supreme Court and Congress that properly are delegated only to the Judicial Conference of the United States through the conference rules committees.[14] Contrary to the purposes of the rules[15] and contrary to the standard established in *Miner v. Atlass*,[16] which stated that district courts cannot institute "basic procedural innovations" under the guise of local rules,[17] the local courts have arrogated to themselves powers not delegated to them. Pursuant to their rulemaking power, the courts have introduced limitations on the number of interrogatories that may be served,[18] have made anachronistic references to the old conformity principle,[19] and have regulated endless minor matters of procedural detail. In Wright and Miller's view, "[l]ocal rules, which were expected to be few in number and to cover noncontroversial housekeeping matters, now are extremely numerous and cover a great variety of subject matter."[20]

Wright and Miller further remark that "[m]any local rules have been held invalid . . . . Many other local rules that seem in direct conflict with the general rules remain on the books."[21] An early treatment of local rules, relied upon by Wright and Miller, argues that "[i]t is peculiarly difficult to bring the issue of a local rule's validity before an appellate court."[22] These critics argue, in essence, that the district courts have exercised a power assigned to them neither by the Rules

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14. *See generally* 12 WRIGHT & MILLER, *supra* note 12, at § 3152; WEINSTEIN, *supra* note 2.

15. See Columbia Note, *supra* note 3, at 1253-59 for an argument that the local rules were intended to be few and narrow. For a counterargument, *see* note 285 *infra*.

16. 363 U.S. 641 (1960).

17. *Id.* at 650.

18. 8 WRIGHT & MILLER, *supra* note 12, at § 2168 (Supp. 1980). *See* text accompanying notes 119-29 *infra*.

19. 12 WRIGHT & MILLER, *supra* note 12, at 244. *See* text accompanying notes 81-90 *infra*.

20. 12 WRIGHT & MILLER, *supra* note 12, at 228 (footnote omitted). *See generally Local Rules Survey*, *supra* note 12.

21. 12 WRIGHT & MILLER, *supra* note 12, at 219.

22. Columbia Note, *supra* note 3, at 1263. Another commentator observes, "[i]n most instances the finality rule, limiting appeals from non-dispositive orders, prevents intermediate appeals challenging local rules. Moreover, local bar associations as well as attorneys have been reluctant to cross swords with local judges by challenging their rules in litigation." WEINSTEIN, *supra* note 2, at 121 (footnote omitted).

Enabling Act[23] nor any other source, and have exercised this power largely unchecked because the appellate process has proven peculiarly inadequate to deal with this supervisory task.

The criticism that the district courts exercise impermissible legislative power has focused on the procedure by which local rules are adopted. Judge Weinstein argues that the making of court rules is to be understood through reference to theories of legislation and legislative delegation.[24] This argument leads Judge Weinstein to conclude that publication and debate are desirable before adoption of local rules.[25] At the district level, as at the national level, he advocates requiring notice, hearings, and an opportunity to be heard on proposed rules. His belief, which is widely shared by other critics of the process,[26] is that local rules have usually been developed with minimal consultation and often represent the whims and idiosyncrasies of temporary majorities of judges.

By focusing on what they perceive as usurpation or legislation, these critics have largely ignored the practical utility of local rules. For example, the local rule device serves essential informational purposes that are consistent with most critics' conception of its proper limits. At the most mundane level, the local rules serve as a kind of national notice board, informing lawyers of unexceptionable details of a court's operation. From local rules, lawyers learn in which division they should file a suit,[27] and what regulations govern access to court files and exhibits.[28]

More important, local rules have been essential tools in implementing court policy in administrative matters. Courts differ from most organizations in that they must rely heavily on outsiders, especially members of the bar, in their operation.[29] Particularly in matters affecting the management of case flow, the policies of the court directly

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23. 28 U.S.C. § 2072 (1979).

24. *See* WEINSTEIN, *supra* note 2, at 89-96.

25. *Id.* at 128-29.

26. *See, e.g.*, 12 WRIGHT & MILLER, *supra* note 12, at 220. *See* text accompanying notes 223-25 *infra*.

27. *See, e.g.*, S.D. FLA. R. 1. There is no other source for this information. 28 U.S.C. §§ 81-131 define the boundaries of the districts, and of any divisions of each district, but offer no information about the clerk's office service county by county. In addition, some divisions have been created by local rule. *See* Appendix A, and notes 255-57 *infra* and accompanying text.

28. *See, e.g.*, N.D. ALA. R. 6.

29. *See* H. JACOB & J. EISENSTEIN, FELONY JUSTICE (1977). Judge Hubert L. Will places counsel immediately after the judge in listing "the available work or production force in court cases." SEMINARS, *supra* note 6, at 15.

involve the lawyers who practice before it.[30] When a district court adopts a procedure to implement Federal Rule of Civil Procedure 16 on pretrial practice,[31] the result can only be effective if lawyers know what is expected of them and why. The same is true for many other areas of the policy and practice involved in running the complex operation of a federal trial court. Matters such as determining the balance between "free press" and "fair trial" concerns,[32] dismissing cases for failure to prosecute[33] and interrogating jurors after verdict[34] all involve regulation of the conduct of lawyers, and are clearly within a court's discretion.

Local rules provide a third important informational function because they alert rulemakers to the need for changes in national rules and provide an empirical basis for making changes. District court efforts to develop policies for effectuating national rules may fail, suggesting that the national rule is incomplete, inadequate or leads to unanticipated conflicts with other rules, statutes, or the Constitution. Alternatively, district court policies may succeed, and a formulation embodied in a local rule may commend itself to the national rulemakers. This source of information on procedural developments is only gradually gaining recognition, though precursors can be identified.[35]

Usurpation, legislation, and information have all been a part of the local rules experience. The task now is to determine what balance has been struck among the three. Our notion of the proper procedure to be used in drafting and promulgating local rules turns on a determination of the proper role of local rules in the judicial function.

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30. *See generally* S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (Federal Judicial Center 1977) [hereinafter cited as CASE MANAGEMENT]; Flanders, *Case Management in Federal Courts*, 4 JUST. SYS. J. 147 (1978) [hereinafter cited as Flanders].

31. *See* text accompanying notes 167-75 *infra*, on local rules to implement rule 16.

32. *See* text accompanying notes 176-89 *infra*.

33. *See* note 194 *infra*.

34. *See* text accompanying notes 68-76 *infra*.

35. Judge Weinstein recently said,

> I think it is useful to have local rules supplementing national rules and statutes. The issue parallels that of federalism in the broadest sense . . . . The advantage of our federal system and of the practice of permitting local rules is that they encourage initiative and imaginative development of new ideas in a variety of different settings. Local rules can act as "laboratories," much as the states do.

Letter to the author (Mar. 29, 1978). *See also*, WEINSTEIN, *supra* note 2, at 136. The Advisory Committee on Civil Rules is now making active use of local rules in its own agenda and in occasional proposals for innovation by local rule. *See, e.g., Proposed Amendment to Fed. R. Civ. P.* 33, 77 F.R.D. 613, 645 (1978).

If local rulemaking is indeed the final step in legislative delegation under the Rules Enabling Act, it follows that the courts should adopt corresponding procedures, including not only notice and hearings but also fact-gathering, perhaps by permanent staff. Under this conception we might begin to question the standard adopted by the Supreme Court majority in *Miner*[36] that forbids "basic procedural innovations," and consider the more expansive approach of the *Miner* dissent[37] and apparently of the Court in *Colgrove v. Battin*.[38] Under this approach we might wish to expand use of the local rules as a proving ground for significant procedural change to aid national rulemakers.

If, on the other hand, local rulemaking is understood as a tool for trial courts to use in governing themselves under their inherent powers,[39] as well as under the express authorities for local rules, then it may follow that the subject matter of local rules should be relatively limited and the adoption process simple. Consultation and fact-gathering could be undertaken only to the extent the court found useful. Finally, perhaps there is a distinct "notice board" function that can be clearly distinguished from local rulemaking, so that purely informational matters could be reserved to a separate document.

The purpose of this article is to outline a local rules policy consistent with the history of rule 83, and based on an assessment of the use and abuse of the local rules device. In order to achieve this, it is necessary to consider previous experiences with local rules. The first step requires examining the assertion that the device has been abused, by detailing every available instance in which a local rule has been questioned. The next step will be to describe and assess the procedures employed for drafting and promulgating local rules. The third step involves surveying the scope, use, and purposes of local rules.

II. A Search for Significant Abuses

In order to show that the makers of local rules have unwisely

36. 363 U.S. 641, 650 (1960).

37. *Id.* at 660, 663 (Brennan, J., dissenting) (*Miner* dissent would uphold the local rule regulating procedure under General Admiralty Rule 44, because local rules provide an opportunity for input by the district court, the most apt body to deal with specific problems).

38. 413 U.S. 149 (1973). In *Colgrove*, the Court upheld District of Montana Rule 13(d), which provides for six person juries in civil cases. The Court determined that this rule did not violate the seventh amendment, or 28 U.S.C. § 2072, which states that the right to a jury shall be retained as at common law. The Court also found that the rule was not inconsistent with Federal Rule of Civil Procedure 83.

39. *See* United States v. Howard, 440 F. Supp. 1106 (D. Md. 1977); Levin & Amsterdam, *Legislative Control Over Judicial Rule Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 30-32 (1958). *See also* note 213 *infra*.

usurped powers belonging to the Supreme Court or Congress, it would be necessary to show that local rulemaking power has been commonly abused. Abuses certainly exist, and can be found in many forms. Some of them merely involve areas in which the court already has broad discretion, so a local rule merely imposes a uniform, albeit sometimes arbitrary rule.[40] Other claimed abuses turn out to be inconsequential, moot, or meaningless upon analysis.[41] Still other abuses pose significant problems that may require resolution at the national level.[42]

A. Court Discretion

Several local rules have been attacked as substituting rulemaking for adjudication, "to escape from the arduous but essential task of case-by-case analysis."[43] Among these are local rules that set the amount of a supersedeas bond, require cost bonds, establish a discovery cutoff date, prohibit interrogation of jurors, and allocate payment of discovery expenses.

1. Supersedeas bond

The common local rule indicating the usual amount for a supersedeas bond is useful for examining the notion that rulemaking avoids case-by-case analysis.[44] A typical rule, from the District Court of

40. *See* text accompanying notes 43-90 *infra*.

41. *See* text accompanying notes 91-111 *infra*.

42. *See* text accompanying notes 112-229 *infra*.

43. Columbia Note, *supra* note 3, at 1252.

44. FED. R. CIV. P. 62(d) provides:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

The provisions of subparagraph (a) do not allow a stay as a matter of right in cases involving injunctions, receiverships, or patent infringements where an accounting has been ordered. Only where there has been a money judgment can a stay be obtained as a matter of right, and only where the court has approved the security posted by appellant.

Prior to July 1, 1968, when the Federal Rules of Appellate Procedure were promulgated, rule 73(d) specifically stated the requirements for an "acceptable" supersedeas bond. Rule 73(d) provided that the "amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on appeal, interest, [and] damages for delay." Rule 73(d), however, also provided that the court could affix a different amount for the bond or order security other than the bond if the circumstances so warranted.

The purpose of requiring a supersedeas bond is to protect the claim of the successful party, in case a judgment debtor moved to make himself "judgment proof" while pursuing an appeal. The desire to protect the interests of the claimant is not absolute, however. It has been held that the judgment debtor should not be made to endure irreparable harm merely

Rhode Island, reads:

> A supersedeas bond staying execution of a money judgment shall be in the amount of the judgment plus 10% of the amount to cover interest and any award of damages for delay plus $250 to cover costs, unless the court directs otherwise.[45]

Eight other districts have comparable provisions. Only one of these, rule 28 of the Northern District of Illinois, differs in the important respect that there is no express provision for court discretion. Otherwise the provisions are essentially similar to the Rhode Island rule except for variation in the amount required to cover interest.[46] Referring to the Rhode Island rule and to two others, Wright and Miller say, "[t]his is an unfortunate provision. The appellate rules deliberately say nothing on the size of a supersedeas bond because they intended that this should be fixed individually by the court in each case."[47]

This objection has no force unless applied only to the Northern District of Illinois rule. The Rhode Island language informs lawyers of

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to satisfy the requirements of a hard and fast rule on the amount of bond. *See* C. Albert Sauter Co. v. Richard S. Sauter Co., 368 F. Supp. 501 (E.D. Pa. 1973). In such cases, the interests of the claimant must be balanced with the desire to prevent irreparable harm to the appellant, who may be successful on appeal.

A balancing of interests was necessary in Trans World Airlines, Inc. v. Hughes, 314 F. Supp. 94 (S.D.N.Y. 1970). Hughes, appealing an antitrust judgment in the amount of $145,448,141.00, was required under local rule 33 of the Southern District of New York to post a bond in the amount of judgment plus 11%. Hughes maintained that compliance was impracticable because the sureties contacted would provide a bond of this size only upon deposit of collateral, in cash or government bonds, for the full amount of the bond. The trial judge felt that it was within his inherent power to reduce and modify the bond requirement. *Id.* at 96. This discretion is now explicit in the current version of local rule 33.

What should be the amount of a supersedeas bond? Professor Moore believes that the provisions of former rule 73(d) requiring the amount of the judgment plus interest and costs should be used as the guide in all but extraordinary cases. 9 J. MOORE, FEDERAL PRACTICE ¶ 208.06[2] (2d ed. 1980). Moore states that rule 73(d) was merely the codification of early Supreme Court opinions on the subject and thus should be instructive, even though the rule has been abrogated. *See* Catlett v. Brodie, 22 U.S. 553 (1824) and Jerome v. McCarter, 88 U.S. 17 (1874). However, the fact that the explicit language of rule 73(d) was not retained in Federal Rule of Appellate Procedure 8(b) suggests that the Advisory Committee on Appellate Rules felt that the amount of the bond was best left to the discretion of the district court. Local rules on supersedeas bonds generally conform to former rule 73(d). *See* note 46 *infra*.

45. D.R.I. R. 37.

46. Local rules D. MASS. R. 31 and D.N.H. R. 28, specify 10% to cover interest. Local rules N.D. ILL. R. 28, N.D.N.Y. R. 29, S.D.N.Y. R. 33, and W.D.N.Y. R. 29 all specify 11% for interest. Local rules E.D. LA. R. 6.6 and N.D. TEX. R. 12.4 specify 20% for interest. All specify $250 for costs, a figure that must be unrealistic today in almost all cases. Since there is no current and reliable source for local rules, this enumeration and others in this article may not be complete. *See* note 230 *infra*.

47. 12 WRIGHT & MILLER, *supra* note 12, at 242.

the court's normal requirement and puts them on notice that they should be prepared to show exceptional circumstances if they believe a different amount is appropriate. To the extent that the provision narrows the court's broad discretion to fix the amount individually in each case, it probably achieves a desirable result.

It would be interesting to know precisely how the practice differs in courts that have this provision from the practice in those that do not. There are several possibilities, but for all of them it seems useful to have a local rule. Probably we can assume that Rhode Island and the other districts with such a rule set most of the bonds at the level specified, with most of the exceptions at a lower figure. Possibly the other courts have a similar pattern, following past practice based on former rule 73(d). Suppose, then, that the practice is identical in local rule and non-local rule courts. In that case, it seems clear that a useful purpose is served by informing the bar that exercise of the court's discretion on this point normally leads to a single, predictable result.

Alternatively, suppose the practice is more varied, as Wright and Miller presumably prefer. If the court acts randomly and treats similar cases differently, the result is undesirable. In this situation, a court would do well to adopt and publicize a uniform policy, by rule or otherwise. The harder case would be the hypothetical court that arrives at a subtle and yet precise standard for setting a bond that permitted determination in each instance of the characteristics of the case and led to a result tailored to the case, which would be reached each time a bond was set in a similar case. What sort of information flow would support this achievement? There is relatively little law on bond amounts, and what little there is deals with clearly exceptional cases to which the local rule specification presumably would not apply.[48] Unless it has unpublished or secret standards, our hypothetical court must draw upon the experience, past practice, and sense of fairness of each judge in consultation with counsel.

Two observations seem clear. First, in a mechanical and repetitive matter such as this, it is undesirable to approach each decision as though the case at hand were unique and could be "adjudicated" only after an appraisal of its special characteristics, in light of past action and experience. Lawyers and judges have far better ways to spend their time and money. Second, such a process would probably not achieve our hypothesized goal of setting bonds that vary in fair and predictable ways. A likely outcome would be bond "disparity" reflect-

48. *See* note 45 *supra*.

ing the idiosyncrasies of individual judges and the lawyers they have worked with on this point.

In sum, it is difficult to imagine how a court could function with no bond rule and serve litigants better than if it had a rule or other articulation of its policy. On this matter, as on most local rules matters, if articulable standards exist, it is best not to hide them.[49] If they do not exist, disparate treatment will occur unless the court undertakes the burden of exhaustive investigation and consultation each time a bond is set. Substantial disparity would probably survive even this improbable exercise. Of course, any rule promulgated should contain the allowance for court discretion provided in the Rhode Island rule. Rules that omit this provision are possibly questionable.[50]

2. Cost bonds

Local rules that require security for costs present a somewhat similar issue, but these rules have been attacked on constitutional and other grounds as well. The principal problem that local rules have attempted to address is the foreign plaintiff coming into a jurisdiction with a frivolous claim, bringing suit, and then leaving the jurisdiction before judgment is entered. When this occurs and the plaintiff loses, the court may lack jurisdiction to recover costs. Local rules seek to forestall this result by requiring foreign and sometimes other plaintiffs to post security for costs with the court.

Case law on this subject is sparse. The leading cases are *Farmer v. Arabian American Oil Co.*,[51] *Hawes v. Club Ecuestre El Comandante*,[52] and *Kreitzer v. Puerto Rico Cars, Inc.*[53] In *Farmer*, the plaintiff's case was dismissed when he failed to post a $6000 bond pursuant to the court's order under rule 2(a) of both the Southern and Eastern Districts of New York. On appeal from the dismissal, the plaintiff challenged

49. The Columbia Note authors grant the merit of this approach in connection with one minor matter, while attacking local rules on supersedeas bonds and similar matters for substituting formula for reasoned decisions. Columbia Note, *supra* note 3, at 126. The Supreme Court made a strong argument for articulated standards by local rule in the area of time limits in Miner v. Atlass, 363 U.S. 641, 648-49 (1960). *See also In re* Petrol Shipping Corp., 360 F.2d 103, 108 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966).

50. On the other hand, a court's inherent powers, plus the admonition in Federal Rule of Civil Procedure 1 that the rules are to be construed to secure the just disposition of every action, are probably adequate to remedy the omission. The difference between the Northern Illinois and Rhode Island rules is primarily one of appearance and attitude only, as the court points out in Trans World Airlines, Inc. v. Hughes, 314 F. Supp. 94 (S.D.N.Y. 1970).

51. 285 F.2d 720 (2d Cir. 1960).

52. 535 F.2d 140 (1st Cir. 1976).

53. 417 F. Supp. 498 (D.P.R. 1975).

rule 2(a) as being outside the authority conferred by Federal Rule of Civil Procedure 83. At the time, rule 2(a) read:

> a plaintiff, who is not a resident of the State of New York, shall file within twenty days after service upon him of a demand therefor, a bond for costs in the sum of $250.00, unless the court, on motion and for cause shown, dispenses with the bond or fixes a different amount.

The court of appeals reversed the dismissal, holding that the requirement of a $6000 bond as security for costs was an abuse of the trial court's discretion that effectively denied the plaintiff his day in court.[54] While the court in *Farmer* questioned the validity of rule 2(a)'s fixed requirement that a bond of $250 be posted by all nonresident plaintiffs, it did not invalidate the rule.[55] Rather, the court reversed what it considered to be an abuse of discretion by the court.

In *Hawes v. Club Ecuestre El Comandante*,[56] the court considered the validity of rule 5 of the District Court of Puerto Rico. Rule 5 provided in relevant part:

> When the plaintiff is domiciled outside of Puerto Rico or is a foreign corporation, a bond shall be required to secure the costs, expenses, and attorneys' fees which may be awarded. All proceedings in the action shall be stayed until bond is given, which shall not be less than five hundred dollars ($500.00). The court may require an additional bond upon a showing that the original bond is not sufficient security . . . .
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> . . . .
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> This rule shall be liberally interpreted in favor of the plaintiff so as not to preclude his right to sue through excessive bond requirement. Consistent with this, the Court, for good cause shown, may dispense with this requirement.

The appellant in *Hawes* challenged the order for the bond, alleging that rule 5 contravened the policy of securing an inexpensive determination of every action as expressed in Federal Rule of Civil Procedure 1, placed a limitation on venue in violation of the constitutional principle of equal protection, and obstructed the plaintiff's right to travel interstate in violation of the privileges and immunities clause. The court held that rule 5 did not violate the policy or letter of the federal rules because it is to be "liberally construed" so as not to preclude the plain-

54. 285 F.2d at 721.

55. The case has been wrongly cited as though it did invalidate the rule in 12 WRIGHT & MILLER, *supra* note 12, at 231-32.

56. 535 F.2d 140 (1st Cir. 1976).

tiff's right to sue.[57] The court also found that the appellant's constitutional claims were without merit, because the distinction rule 5 draws between resident and non-resident plaintiffs is rationally related to the end of enforcing an award for costs against a non-resident who may be out of the court's jurisdiction at the time of judgment.[58] A district court reached a similar conclusion in *Kreitzer v. Puerto Rico Cars, Inc.*,[59] in ruling on a similar attack on a revised version of the same rule.

While upholding the validity of rule 5, the court in *Hawes* was careful to point out that "the district court is under an obligation to evaluate each case individually, and to exercise its inherent discretion to apply the requirements of rule 5 so as to facilitate a just and speedy determination on the merits as required by Fed. R. Civ. P. 1."[60] Further, the court pointed out that " 'to require *all* foreign plaintiffs, *as such*, to post substantial security as a condition to access to the courts may well be an unconstitutional denial of equal protection.' "[61]

As was true of supersedeas bonds, local rules concerning security for costs only conflict with the Federal Rules of Civil Procedure or the Constitution if they preclude the use of judicial discretion.[62] The great majority of local rules on this matter do provide for the use of judicial discretion in determining if a bond is necessary. Some rules, however, impose the requirement of a bond as a matter of course and allow for reduction or elimination of the bond only for good cause shown by the plaintiff. A few rules do not explicitly provide for the use of discretion, at least insofar as eliminating the requirement for a bond is concerned.[63] If the discretion is not abused, as it was in *Farmer*, enforce-

57. *Id.* at 143.

58. *Id.* at 145.

59. 417 F. Supp. 498 (D.P.R. 1975).

60. 535 F.2d at 145.

61. *Id.* at 145 (emphasis added) (quoting Coady v. Aguadilla Terminal, Inc., 456 F.2d 677, 679 (1st Cir. 1972)).

62. But again, inherent power may be adequate. *See* notes 39, 44 & 50 *supra*. A constitutional attack was also found wanting in Brewster v. North Am. Van Lines, 461 F.2d 649, 651 (1972). In *Hawes*, the court enumerated several factors to be considered by a court in determining whether a bond is necessary. These include ownership by a non-resident plaintiff of attachable property in the district, the likelihood of success on the merits, the presence of a co-plaintiff who is domiciled in the district, the conduct of the litigants, and the purposes of the litigation. 535 F.2d at 144.

63. Local rules on non-resident plaintiff bonds are either discretionary, mandatory upon request of the defendant or purely mandatory.

Local Rules which provide that a bond is discretionary include: N.D. ILL. C.R. 2; S.D. ILL. R. 2; N.D. IND. R. 4 ("Upon good cause shown"); D. NEB. R. 15(F); D.N.D. R. XXIV(C)(1) (upon good cause and defendant's motion); W.D. PA. R. 9(a) (good cause and motion by defendant); M.D. PA. R. 701.4 ("may"); D.P.R. R. 5 (good cause); W.D. WASH.

ment of the rule presents no problem.

Rules providing for posting of bonds by non-resident plaintiffs differ from rules on supersedeas bonds in that they add a requirement not specified in the federal rules. Once again, a useful purpose is served by specifying the instances in which the requirement is likely to be imposed. This puts lawyers and their clients on notice, alerting them to the need to show special circumstances if they require treatment that differs from the court's normal practice.

3. Limitations on discovery

As with cost bonds, local rules that establish a discovery cutoff date also add a requirement not in the national rules. Discovery time limits have been criticized on the grounds that they make routine a decision that should be tailored to a particular case[64] but they have not been characterized as impermissible in general. The Columbia Note authors say, "[t]he wide differences in the times allotted by the rules themselves suggest that it is not possible to predetermine accurately how much time is reasonable in particular classes of cases . . . . The rule-making approach saves judicial time and effort at the expense of the policies behind the federal discovery rules."[65]

This is a large topic that cannot be treated in detail here. Convincing empirical evidence demonstrates that court-imposed discovery cutoff dates are valuable in keeping discovery within reason.[66] No prohibition of this activity exists.[67] Abuse of discovery is a matter of wide-

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R. G.R. 5(a) ("may"); W.D. WIS. R. 3(a); D. MONT. R. 17(b) (good cause); E.D. PA. R. 38(a).

Local rules which make the posting of a bond mandatory upon defendant request include: D. IDAHO R. 7; D. ME. R. 33; D. MD. R. 31; D.N.J. R. 35(D); W.D.N.Y. R. 25; E.D. WASH. R. 23(a).

Posting of a bond is mandatory under the following rules: E.D. & W.D. ARK. R. 4(b); D. HAWAII R. 7; S.D. IND. R. 4; E.D. ILL. R. 2(a).

64. Columbia Note, *supra* note 3, at 1262; 12 WRIGHT & MILLER, *supra* note 12, at 238. Raising an issue that is now moot, the authors of the Columbia Note question the related practice of granting leave to take depositions within twenty days of filing. Columbia Note, *supra* note 3, at 1262. Before 1970, rule 26 required the plaintiff to obtain leave of court in order to take a deposition noticed within that period. The authors are clearly correct that to grant leave by rule was "an extreme violation of the clear purpose [of the old rule] . . . invalid on its face as 'inconsistent' with rule 26." *Id.*

65. Columbia Note, *supra* note 3, at 1262.

66. *See* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY ch. VI. (Federal Judicial Center 1978) [hereinafter cited as JUDICIAL CONTROLS]. *See also* note 31 *supra*.

67. Indeed, the *Miner* Court noted that "rules fixing the time for doing certain acts are the essence of orderly procedure." 363 U.S. at 648-49. Of course, discretion may not be abused.

spread concern, and there have been several recent proposals to limit discovery rights by rule amendment.[68] To date, those proposals have been rejected or modified on the ground that judicial management is a more flexible and useful approach.[69] The National Commission for the Review of Antitrust Laws and Procedures recently endorsed judicial controls as a better approach to restrict discovery than more drastic measures, stating that "when the parties lack incentives to expedite the case, judicial control is the single most important factor in eliminating waste and delay."[70] Because the power to set an appropriate discovery deadline is not questioned, and doing so has been found generally permissible within the court's discretion, this is another area in which it is useful to promulgate a local rule, so the bar knows what the court will allow in most cases.

Ultimately, this becomes a question of local administrative policy, which the criticisms of local rules do little to illuminate. If a court finds that its caseload is sufficiently uniform and the judges' policies on discovery sufficiently similar that a ninety-day limitation will be found realistic in most cases, then it seems useful, as with other aspects of court discretion, to so inform the bar by local rule. However, if either condition (or both) does not hold, very likely there should not be a rule. Certainly there should not be a rule if one or more judges normally impose no cutoff date or allow a period much longer or shorter than the others. In that case, a rule will be more misleading than informative. However, it may be possible to establish agreement on policy and practice through promulgating a rule, provided the judges of a court agree to be bound by it.

The Columbia Note authors fail to show any clearly objectionable features of the cutoff rules they criticize. They criticize an Arkansas rule, which has since been revoked, that seemed to establish a very high standard for exceptions to the rule-imposed cutoff because it required "manifest injustice."[71] Actually this rule only prohibited discovery af-

68. *See, e.g.*, ABA Litigation Section, Report of the Special Committee for the Study of Discovery Abuse (Oct. 1977) [hereinafter cited as ABA Report].

69. The [Advisory] Committee [on Civil Rules] believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases . . . . In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure 5 (Feb. 1979) (Committee on Rules of Practice and Procedure, Judicial Conference of the United States).

70. Report to the President and the Attorney General 18 (Jan. 22, 1979).

71. E.D. & W.D. ARK. R. 9(e) (rescinded 1979).

ter the pretrial conference, and no earlier limitation was mentioned. Unlike the other cutoff rules the Columbia Note authors considered, that rule was not primarily a discovery provision at all. Its purpose was to protect the integrity of the pretrial process by assuring that the pretrial order would be meaningful. Because discovery between pretrial and trial can clearly be an instrument of surprise at trial, it is hard to see how such a limitation could conflict with the structure or purpose of the rules.

Another criticized provision, Western District of North Carolina General Rule 10, sets a ninety-day limit on discovery following joinder of issue, permitting exceptions for the "exceptionally difficult case." Data now available suggest that this rule provides reasonable guidance, though perhaps a one hundred twenty-day limit would be better.[72]

The District of Massachusetts has an odd requirement, regarding the issuance of a notice of delinquency in responding to interrogatories, that is more likely to delay discovery than to expedite it. The rule states:

> If a party on whom interrogatories have been served does not serve answers or objections, as appropriate, within the time allowed, the party who served the interrogatories may apply in writing to the clerk for issuance to the delinquent party of a notice of his delinquency. The clerk shall issue such a notice on application, and the party making the application shall not for 20 days thereafter make a motion for an order compelling an answer or an order penalizing the delinquent party for failing to serve answers.[73]

In effect, the rule prevents a lawyer from filing a motion to compel until he has completed this novel step and waited twenty days. Not only does the rule withdraw for this period a power granted in Federal Rule of Civil Procedure 37(a),[74] it also delays any motion for sanctions that might turn out to be necessary. This rule has not been attacked,[75] though it seems more questionable than the cutoff provisions.

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72. JUDICIAL CONTROLS, *supra* note 66, at 80-81.

73. D. MASS. R. 15(g).

74. Federal Rule of Civil Procedure 37(a) provides for sanctions for failure to make discovery after giving the appropriate parties notice and making application to the appropriate court.

75. A related group of provisions, designed to assure that discovery is automatic and does not normally involve the court, was singled out for praise by two commentators. The most common is the requirement that parties must confer on discovery disputes before applying to the court for resolution. *See Local Rules Survey, supra* note 12, at 1048 (citing 4A J. MOORE, FEDERAL PRACTICE ¶ 26.02[5] (2d ed. 1980)).

4. Interrogation of jurors

Local rules that limit interrogation of jurors after verdict are the subject of a vigorous attack by Raymond Caballero, a lawyer in El Paso, Texas.[76] Mr. Caballero believes that these rules are "facially invalid."[77] The rule he attacks reads as follows:

> No attorney or any party to an action or any other person shall himself or through any investigator or other person acting for him interview, examine or question any juror, relative, friend or associate thereof either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.[78]

Many district courts have promulgated comparable local rules.[79] The rules are designed to safeguard the interests of freedom of deliberation, promote stability and finality of verdicts, and protect jurors from harassment and embarrassment.[80] While the law is replete with cases stating that contact with jurors after trial is either disfavored or prohibited outright unless leave of court is obtained,[81] the issues of whether and how the post-trial interviewing of jurors should be controlled by court rule have not been resolved.

On the one hand, the lack of an express federal prohibition of post-trial interviews indicates that the matter should be dealt with on a case-by-case basis. Rule 606(b) of the Federal Rules of Evidence,

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76. Caballero, *Over-Exercise, supra* note 5. *See also, Conference on Rule Making, supra* note 5, at 48.

77. Caballero, *Over-Exercise, supra* note 5, at 328.

78. W.D. TEX. R. 20.

79. The following rules regulate the post-verdict interrogation of jurors: N.D. ALA. R. 10 (communication permitted after juror's release from service); S.D. ALA. R. 12 (court's permission after formal written petition); D. CONN. R. 12(f) (no interrogation of jurors regarding deliberations except as permitted by the court in open court); D.D.C. R. 1-28 (leave of court, good cause, in open court); E.D. LA. R. 14.5 (no jurors may be interviewed without court order); W.D. LA. R. 16 (leave of court, good cause shown); D. MD. R. 25A (leave of court, good cause shown); S.D. MISS. R. 16 (attorney shows judge relevant evidence; if "probable cause" found, attorney can question juror); E.D. MO. R. 16(D) (leave of court, good cause); W.D. TEX. R. 20 (leave of court, good cause); D. WYO. R. 18(b) (written interrogatories with affidavit giving reasons; interview according to interrogatories; second affidavit giving results of interview).

80. *See* McDonald v. Pless, 238 U.S. 264, 265-69 (1915) (juror impeachment); United States v. Moten, 582 F.2d 654, 665 (2d Cir. 1978) (discussion of these interests in relation to FED. R. EVID. 606(b), which regulates juror interrogation).

81. *See, e.g.*, Miller v. United States, 403 F.2d 77 (2d Cir. 1968); United States *ex rel.* Daverso v. Hohn, 198 F.2d 934 (3d Cir. 1952); United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967).

which allows jurors to give affidavits concerning untoward influences on their verdicts, also encourages an adjudicative approach to the question. In suggesting that reasonable grounds be present before juror interviews are conducted,[82] and that the interviews be conducted with "circumspection and restraint,"[83] the American Bar Association implicitly favors this approach. The contrary position is embodied in the view that the post-trial questioning of jurors "must only be conducted under the strict supervision and control of the court, with inquiry restricted to those matters found by the court as both relevant and proper."[84] In other words, the court is regarded as best able to address the interests at stake in such situations.

The absence of federal statutes prohibiting judicial control of juror interviews seems ample authority, pursuant to Federal Rule of Civil Procedure 83, Federal Rule of Criminal Procedure 57, and 28 U.S.C. section 2071, to justify the existence of local rules such as the Western District of Texas rule. Since none of these local rules have been directly challenged in court, Mr. Caballero's complaint remains a personal expression of one side of a policy issue, and an assertion that discretion has been abused in certain cases. Abuse of discretion in connection with this local rule, however, is a more likely subject for a practical appeal than on many others, because a final judgment exists.

Again we are dealing with a local rule that defines the court's exercise of discretion. With regard to juror interviews, perhaps this one only restates the case law. Still, Mr. Caballero's complaint raises a question of policy, even if the rule in question appears to be lawful. Caballero certainly has identified a dilemma thrust upon the lawyer who suspects that improper influence reached a jury. The lawyer may not interview jurors unless he can show improper influence, yet perhaps he cannot make a showing until he *has* interviewed jurors. A national rule might be considered that would specify more precisely the showing required for a lawyer to have access to jurors. This presents a useful opportunity to take advantage of local experience in determining what should or should not be included in the national rules.

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82. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, The Defense Function § 7.3(c) (1971). *See also* United States v. Molen, 582 F.2d 654, 667 (2d Cir. 1978).

83. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-30.

84. United States v. Brasco, 516 F.2d 816, 819 n.4 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975).

5. Payment of deposition expenses

Two local rules that provide for payment of expenses when a deposition is to be taken at a distant place have been criticized because they reverse the burden, which is on the party being deposed, to show that the contemplated discovery will impose a hardship.[85] While both rules are certainly questionable, one of them[86] only informs the bar of what the court "may provide" in what would be a clearly lawful protective order. This provision is little more than notice of the court's likely stance. The other rule does provide that the court "shall . . . prepay or secure the cost of travel"[87] of opposing counsel within certain limits, a novel provision that surely belongs in the federal rules, if anywhere.

6. Summary

The rules we have examined thus far seem to do little more than restate the discretion available to the court, or attempt to define how available discretion will be exercised. The latter seems clearly useful in informing lawyers of court policy, the former is only slightly less so. The few rules that define a court policy without explicit provision for variation when exceptional circumstances are shown are questionable. This seems to be mostly a drafting error with no great practical significance.[88]

No error uncovered thus far supports a characterization of local rules as "an unmitigated disaster" or a reliance "on prefabricated solutions rather than analysis in dealing with unresolved problems."[89] However, as with the rules that provide travel costs for depositions, there is always a potential danger when local rules are used to state or restate court discretion. Drafters of local rules must be careful not to create a new presumption or reverse an existing burden as they try to describe a court policy that itself is within the rules.[90]

B. Minor Problems

A sizable group of purported abuses do not withstand analysis.

85. Cohn, *supra* note 12, at 283.

86. N.D. ILL. CIV. R. 4(a).

87. E.D. VA. R. 21(B)-(C).

88. Of course, all federal rules, including local rules, are subject to the proviso that: "They shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. In addition, judges have often found the necessary discretion, whether it was expressly provided or not. *See* note 50 *supra*.

89. Columbia Note, *supra* note 3, at 1271.

90. *See* text accompanying notes 119-27 *infra*.

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Several local rules claimed to be abusive are not, or the problems posed are moot or inconsequential.

Perhaps the most notable instance of local rules that pose few problems are those that invoke state practice. The Columbia Note authors say that "some local rules call for state procedure to govern in the absence of any controlling federal rule. . . . Such rules undermine the whole concept of an independent federal system."[91] Only slightly less emphatic, Wright and Miller, relying on some of the same rules, say:

> Some districts have a local rule saying that the procedure in the state courts shall govern in the absence of any controlling federal rule. Provisions of that kind destroy the power intended to be granted by the final sentence of Rule 83 and are at least a vestigial return to the era of conformity with state procedure that it was a principal purpose of the Civil Rules to end.[92]

Rule 83 certainly had the purpose mentioned,[93] and a local rule that required conformity in this fashion would indeed be contrary to its purpose. But no such local rule appears to exist now.[94] Consider the following current rules, establishing a procedure in absence of a rule, which were cited in both commentaries:[95]

> Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Federal Rules of Civil Procedure or of these rules, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be ap-

91. Columbia Note, *supra* note 3, at 1261 n.55 (citing S.D. CAL. R. 27; N.D. GA. R. 2; N.D. ILL. CIV. R. 19).

92. 12 WRIGHT & MILLER, *supra* note 12, at 244 (footnotes omitted).

93. Columbia Note, *supra* note 3, at 1261 n.55. *See* text accompanying notes 3 & 4 *supra*.

94. There is no adequate collection of outdated local rules. The "rules room" in the library of the Supreme Court contains a file folder for local rules furnished by each court, pursuant to rule 83. A search of those files did not uncover any "conformity rules" stronger than those quoted. However, the files may not be complete.

95. Since the Columbia Note was written, the Southern District of California was split, and the Central District created. Pub. L. No. 89-372, § 3, 80 Stat. 75 (1966) (amending 28 U.S.C. § 84). *See* Carl Baar, When Judges Lobby: Congress and Court Administration (1969) (Unpublished Dissertation, U. of Chicago). The Central District itself may shortly be split. H.R. REP. No. 2505, 96th Cong., 1st Sess. (1979). Until the new Southern District recodified its rules in 1979, the Central and Southern Districts had similar rules and numbering systems. Thus, present Central District Rule 27 is the Southern District Rule referred to in the Columbia Note passage quoted at note 91 *supra*.

> plied or, in the absence thereof, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.[96]
>
> Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Rules of Civil Procedure, or of the Rules of the United States District Courts for the Eastern and Southern Districts of New York, it shall be determined, if possible, by the parallels and analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States shall be applied, or in default thereof, in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied.[97]

These rules and their counterparts elsewhere provide nothing more than advice. They do not require conformity with state practice, they only suggest that approach among many others. It may add nothing to tell lawyers that state law "may" be applied if all else fails, but there is no harm in doing so. The framers of rule 83 probably would have permitted a *more* prominent place to the conformity approach, among the many possibilities mentioned. Addressing a question about the meaning of rule 83, committee chairman William D. Mitchell said:

> That doesn't say they must follow the state practice under the Conformity Act. They may follow the state practice, if they think that is an adequate one, and probably will in most cases, but the Conformity Act does not fill the gap. The district judges fill it. We hope there are not going to be many gaps, but you never can tell, and we had to provide for that situation.[98]

"Conformity" in this broad sense is probably fairly common in federal courts,[99] and it is difficult to quarrel with. A recent study by the

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96. C.D. CAL. R. 27.

97. S.D.N.Y. G.R. 8.

98. ABA INSTITUTE (Cleveland), *supra* note 4, at 189.

99. For example, the following local rules specify a procedure in absence of rule: D. IDAHO R. 25; N.D. ILL. R. 19; N.D. W. VA. R. 2.31. These rules generally state that if no federal rule is applicable, procedural questions shall be determined "by the parallels or analogies furnished by such statutes and rules." Note, however, the following deviations: N.D. OHIO R. 21.04 ("In any proceeding or in any instance where there is no applicable rule or procedure, a Judge may prescribe the same."); D. ALASKA R. 36 ("The court may in the

Federal Judicial Center found that *voir dire* practice often follows state practice.[100] Because most federal trial lawyers have a substantial state practice, and federal judges are often recruited from their ranks, it would be surprising if this effect did not exist. As a matter of policy it seems appropriate for federal courts to follow state practice in most instances where no other guide exists. It would seem perverse to depart from procedures judges and lawyers are familiar with unless there is a compelling reason.

Actually, there are provisions elsewhere that are stronger in urging conformity than any local rules. For example, Federal Rule of Civil Procedure 4(d)(2) provides that service shall be made as follows:

> Upon an infant or incompetent person, by serving the summons and complaint *in the manner prescribed by the law of the state in which the service is made* for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. (emphasis added).

In *Dredge Corp. v. Penny*[101] a local rule was found invalid because it denied a right to oral argument in motions for summary judgment: The offending rule has been withdrawn, and no other rules now in effect contain similar language.[102]

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exercise of its discretion excuse compliance with these rules if interests of justice so require.").

One commentator identified five local rules that expressly incorporate state practice on continuances. All of these have been withdrawn except W.D. Wis. R. 10. *Local Rules Survey, supra* note 12, at 1059 n.315.

100. "The percentage of federal judges allowing oral participation by lawyers is greatest in states in which state court rules either emphasize lawyer participation or are discretionary, as in Federal Rules of Civil Procedure 47(a)." G. BERMANT & J. SHAPARD, THE VOIR DIRE EXAMINATION, JUROR CHALLENGES, AND ADVERSARY ADVOCACY 23 (1978) (Federal Judicial Center 1968). On the other hand, Mr. Caballero argues cogently that there should be a national policy on such an important matter, defined in the federal rules. Caballero, *Overexercise, supra* note 5, at 328.

101. 338 F.2d 456, 462 (9th Cir. 1964).

102. The requirement established in *Dredge*, that local rules not preclude a party from requesting oral argument, nor deny such a request unless the summary judgment motion is to be denied, is followed by every local rule on summary judgments. The following rules mention summary judgment motions. Those in which Federal Rule of Civil Procedure 56 is mentioned are flagged with an asterisk: S.D. ALA. R. 8; D. ALASKA R. 5(C), 5(H); D. ARIZ. R. 11(e), 11(h); C.D. CAL. R. 3(g); E.D. CAL. CIV. R. 116; D. CONN. R. 9(d); D.D.C. R. 1-9(h); S.D. FLA. R. 10(J); *N.D. GA. R. 91.71, 91.72; *S.D. GA. R. 6.6; D. HAWAII R. 2(3); D. IDAHO R. 4(e); S.D. ILL. R. 7; N.D. IND. R. 7(b); S.D. IND. R. 8; E.D. LA. R. 3.9, 3.10; M.D. LA. R. 5(E); *D. NEB. R. 20(H); D.N.M. R. 9(j); *N.D.N.Y. R. 10(e); *S.D.N.Y. R. 9(g); D.R.I. R. 12.1; W.D. TENN. R. 8(d); N.D. TEX. R. 5.2(a); E.D. VA. R. 11(G); D. WYO. R. 6(d).

District Court of Rhode Island Rule 12.1 specifically gives effect to the language used in

Other rules are no longer improper because provisions of the Federal Rules of Civil Procedure with which they once conflicted have themselves been changed.[103] In a few minor instances, old local rules are now improper because a change in the federal rules introduced a conflict. For example, a 1963 amendment to rule 58 forbids a district court to direct attorneys to prepare forms of judgment as a matter of course. Several local rules still direct attorneys to prepare judgments.[104] While these rules are obsolete and unlawful, it seems likely that they have minimal practical effect because a judge remains free to order an attorney to draft a form of judgment in any appropriate case. In a case that seemed not "appropriate," it seems unlikely that the presence of the rule would lead the court to insist upon this practice over a lawyer's objections.

Rule 30 of the Western District of Pennsylvania contains an unusual provision that adds a specification regarding pleading practice.[105] The rule, entitled "Claim for Damages Unliquidated," reads as follows: "Except for any required jurisdictional allegation of the amount in controversy, a pleading demanding relief for elements of general damages unliquidated in amount shall, without claiming any specific sum, set forth only that money damages are claimed and may specify the categories of damages so claimed."[106] This rule is still enforced before this court. A reference to the rule in a published opinion clearly suggested the judge expected pleadings to meet this novel requirement.[107] Although the rule adds a pleading requirement, it is only a minor addition essentially consistent with the intent to keep pleadings simple.

The Wright and Miller treatise cites, as the "clearest examples" of improper local rules, two local rules of the Court of Appeals for the First Circuit.[108] Local rule 8 provides that a case will be docketed as soon as the record is received, "notwithstanding" rule 12 of the Federal Rules of Appellate Procedure, which requires a court to wait until the fee has been paid. The main problem with this rule is the insertion of

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Dredge. See also Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 391-92 (6th Cir. 1975) (court upheld Northern District of Ohio Rule requiring application before oral argument will be permitted).

103. *See* Columbia Note, *supra* note 3, at 1262 (deposition limitation).

104. C.D. CAL. R. 7a; E.D. CAL. R. 121; D. IDAHO R. 18a; N.D. OHIO R. 5.02 (prevailing party prepares "at the court's direction"); E.D. OKLA. R. 23; W.D. OKLA. R. 22; E.D. WASH. R. 20; D. WYO. R. 23.

105. This rule, and the objection to it, were brought to the author's attention by Professor Wright in a personal communication, May, 1978.

106. W.D. PA. R. 30.

107. Knouff v. United States, 74 F.R.D. 555, 557 (W.D. Pa. 1977).

108. 12 WRIGHT & MILLER, *supra* note 12, at 219.

the word "notwithstanding," which makes a valid rule appear invalid. Local rule 8 only reiterates the position of the Supreme Court in *Parissi v. Telechron*.[109] Federal Rules of Appellate Procedure 3 and 12 were recently amended to conform to this decision.[110] To greater effect, Wright and Miller also criticize[111] First Circuit Rule 11(c), which also uses the impermissible "notwithstanding," and states that the court "may decline to refer to portions of the record omitted from the Appendix . . . ." Federal Rule of Appellate Procedure 30 says "[t]he fact that parts of the record are not included in the appendix shall not prevent parties or the court from relying on such parts." Here the use of "may" in the First Circuit rule seems to forestall a part of the conflict, though conflict does remain. Upon analysis, these "clear" examples of improper rules appear to be nothing of the kind. Only the gratuitous use of the word "notwithstanding" suggests an apparent conflict with the federal rules, but in operation the word adds nothing to either rule.

C. *Consequential Problems*

1. Six-member juries

Perhaps the most serious abuse of the power to make local rules is the widespread rule[112] providing for a six-member jury in civil cases. The spread of this rule seems to have followed from the interest of Chief Justice Warren E. Burger, who has urged district courts to adopt this rule not only as a direct economy measure, to reduce juror expense and inconvenience, but also to speed the courts' handling of civil jury trials.[113]

Whether six-member juries are a good policy or not is a complex

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109. 349 U.S. 46 (1955). The *Parissi* Court held that "the Clerk's receipt of the notice of appeal within the 30 day period satisfied the requirements of § 2107, and that untimely payment of the § 1917 fee did not vitiate the validity of the petitioner's notice of appeal." *Id.* at 47.

110. *See* H.R. Doc. No. 96-112 (transmitting amendments to various federal rules, May 1, 1979), at 33-34, 51-52.

111. 12 Wright & Miller, *supra* note 12, at 219.

112. Eighty-five of the ninety-five courts had such a rule in September, 1978, as reported to the Judicial Conference of the United States; Proceedings (1978) at 78.

113. In addition to informal settings within the judiciary, the Chief Justice has encouraged use of a smaller civil jury in various addresses and interviews. *See Slow Justice is Inadequate Justice*, Forbes 21, 22 (July 1, 1971); *The State of the Federal Judiciary Address* (1971), *reprinted in* 57 A.B.A.J. 855, 860 (1971); *Annual Report on the State of the Judiciary* 4 (Feb. 16, 1976), *reprinted in* 62 A.B.A.J. 443 (1976); Year-end Report of the Judiciary 7 (Jan. 1, 1978); State of the Judiciary Address 4 (1978).

At its meeting of March 15-16, 1971, the Judicial Conference of the United States approved "in principal" a reduction in jury size, leaving open the question whether this should be accomplished by rule or statute. Proceedings (1971), at 5-6.

problem. The costs and the benefits are not fungible, and they are hard to calculate on any basis. The savings of six-member juries are all expressible in dollar terms in principle, though a rigorous accounting would be complex and has never been undertaken. One would need to assign a value to jurors' opportunity costs, and add in the juror fees and apply these to an adequate estimate of the number of juror days to be saved, assuming that the number of days of jury trial would not change as a result of the rule. More difficult, but surely possible, would be estimating the number of trial days a six-member jury rule would save, and assigning a dollar value to the result, calculating costs to parties and to the court. These calculations could produce an estimate of the total savings from the rule, which in the final analysis are probably substantial.

But how do we make a corresponding calculation of the cost of the change? Richard Lempert has made a convincing showing that different verdicts are highly probable in a small proportion of cases: the close ones.[114] It seems likely that Chief Justice Burger did not anticipate this, and expected little or no impact of the rule on outcomes. Indeed, he has said as much in voting with the majority in *Colgrove v. Battin*,[115] which upheld local rules providing for six-member juries. Treating the matter for the moment as one of policy rather than law, it is quite possible to imagine an acceptable justification for this rule as an economy measure, though the difficulty of measuring the costs and benefits assures that the matter will remain controversial.

As a matter of law interpreting rule 83, the *Colgrove* decision now seems impossible to sustain. Surely the six-member jury is a "basic procedural innovation" at least of equal consequence as depositions in admiralty cases, discussed in *Miner v. Atlass*.[116] In *Ballew v. Georgia*,[117] the Court found five-member juries to be unconstitutional in a criminal case, so one may presume that a six-member jury must amount to a basic change. *Colgrove* could only be valid if it is read as a shift away from the *Miner* standard that would permit innovation and experimentation within the local rulemaking power on a larger scale than the Court previously thought permissible. Whatever the problems

114. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975).

115. 413 U.S. 149 (1973). *Colgrove* has been widely criticized. *See, e.g.*, Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284, 1285 (1978); Grofman, *Jury Decision Making Models and the Supreme Court*, 2 LAW & POL'Y Q. 285 (1980); 12 WRIGHT & MILLER, *supra* note 12, at 221-22.

116. 363 U.S. 641 (1960).

117. 435 U.S. 223 (1978).

with six-member juries, however, the rule does not make the case for critics of local rules because the Supreme Court declared it acceptable.[118]

2. Limits on the number of interrogatories

More compelling as a problem with local rules is the rule adopted in nine districts that limits the number of interrogatories that may be filed unless leave is obtained. Maryland Rule 6(B) is typical, though other courts permit different numbers of interrogatories:[119] "Unless otherwise permitted by the court for good cause shown, no party shall serve upon any other party, at one time or cumulatively, more than 30 written interrogatories, including all parts and subparts, pursuant to Rule 33, F.R. Civ. P."

Rule 33 of the Federal Rules of Civil Procedure provides that any party may serve written interrogatories upon any other party. Rule 26(a) provides that "[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited." Thus, the number of interrogatories that may be propounded by a party is limited only by the court's discretion in protecting a party from "annoyance, embarrassment, oppression, or undue burden or expense," as Federal Rule of Civil Procedure 26(c) provides. Such a protective order will be provided only upon motion of the party seeking protection and only for good cause shown. The burden of proving that certain interrogatories, or other discovery devices, are burdensome or oppressive rests with the party seeking the court's protection.

Case law on this subject is in accord with the liberal interpretation to be given discovery under the federal rules. In *Kainz v. Anheuser-*

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118. With one unusual circumstance: *Colgrove* placed Chief Justice Burger in the anomalous position of passing on his own work, given his previous role in encouraging use of reduced civil juries. Judge Weinstein has shown that courts of appeals are sometimes in a similar position when they are asked to review work they have initiated or approved as a Judicial Council under 28 U.S.C. § 332. WEINSTEIN, *supra* note 2, at 126. Since, under 28 U.S.C. § 331, a Chief Justice presides over the Judicial Conference of the United States, this anomaly is inevitable on occasion, as cases that question Conference policies or actions find their way to the Court. The author is not aware of any other case in which any Chief Justice has recused himself on these grounds, so probably Chief Justice Burger was on firm precedential ground in hearing *Colgrove*. If the Chief Justice's responsibilities to the Judicial Conference were removed and assigned elsewhere, as Chief Justice Burger has suggested, this problem would not exist.

119. *See, e.g.*, M.D. FLA. R. 303 (50 maximum); N.D. MISS. R. C-12 (2 sets: 1st set 30 maximum; 2d set 20 maximum); D. WYO. R. 7(f) (50 maximum); S.D. FLA. R. 10(I) (40 maximum); D. MD. R. 6(B) (30 maximum); S.D. MISS. R. 17 (30 maximum); W.D. TENN. R. 9(g) (30 maximum); S.D. CAL. R. 230-1 (25 maximum); N.D. ILL. R. 9(g) (20 maximum).

Busch, Inc.,[120] the plaintiff objected to the number of interrogatories propounded by the defendant on the ground that their excessive number made the interrogatories vexatious and oppressive. In support of this claim, the plaintiff alleged that it would take one week to prepare answers to the interrogatories. In overruling the objection of the plaintiff, the court recognized that answering the interrogatories might indeed be burdensome.[121] The court noted, however, that

> the fact that interrogatories may be burdensome is alone not enough to excuse a party from answering. Use of the liberal discovery techniques provided by the Federal Rules may often prove time consuming and expensive . . . .
>
> The fact that the interrogatories number forty-one is no basis for objection . . . .
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> The limits imposed by the requirements of justice [to protect the party from annoyance, expense, embarrassment, or oppression] are not to be found in the application of some fixed formula, but must be determined by the circumstances of the case.[122]

In support of this position, the court cited the Advisory Committee note to the 1948 amendment of rule 33, which states:

> it is provided that the number of or the number of sets of interrogatories to be served may not be limited arbitrarily as a general policy to any particular number, but that a limit may be fixed only as justice requires . . . in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis.[123]

Numerous decisions hold that a specified number of interrogatories will not be considered burdensome[124] and that the burden of proving that interrogatories are burdensome rests with the party objecting to them.[125]

Local rules dealing with interrogatories also shift the burden of proof concerning whether or not the interrogatories are oppressive from the party being interrogated to the interrogator. Finally, they depart from a steady evolution that has loosened restrictions on interroga-

120. 15 F.R.D. 242 (N.D. Ill. 1954).

121. *Id.* at 247.

122. *Id.* at 247-48.

123. *Id. See also* United States v. Kordel, 397 U.S. 1, 9 (1969) (respondent has the burden of proving that government interrogatories are improper).

124. *See, e.g.*, Stoneybrook Tenants Ass'n v. Alpert, 29 F.R.D. 165, 168 (D. Conn. 1961).

125. *See, e.g.*, Luey v. Sterling Drug, Inc., 240 F. Supp. 632, 634 (W.D. Mich. 1965).

tories. Rule 33 was more restrictive before a 1970 amendment, so local rules that modify it depart from a specific, recently articulated national policy.[126]

So far, no case has invalidated or upheld a local rule limiting interrogatories to a specific number.[127] This lack of judicial review leaves these local rules on the books even though they conflict with the Federal Rules of Civil Procedure. The local rules may have served a useful purpose, however, because they have provided an opportunity to gain experience on a limited scale with a provision that interests several national bodies.[128] So far, where the provision has been tried, the experience seems to have been generally favorable.[129]

3. Restrictions on communications in class action suits

Local rules have been found invalid that restrict communications by class action lawyers with members of the class.[130] These rules have their source in the work of a series of national bodies, and the unsatisfactory experience with them strongly suggests that Federal Rule of Civil Procedure 23, which governs class actions, should be modified. The *Manual for Complex Litigation (Manual)* identifies several potential abuses to which the class action suit is subject. These are:

> 1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; 2) solicitation of funds or agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; 3) solicitation by

126. *See* 8 WRIGHT & MILLER, *supra* note 12, at § 1261; JUDICIAL CONTROLS, *supra* note 66, at ch. I.

127. See Bauer, *General Local Rule 9(g) of the United States District Court for the Northern District of Illinois and the Federal Rules of Civil Procedure: Are They Consistent?* 9 J. MAR. J. PRAC. & PROC. 923 (1976), for a highly critical analysis.

128. *See, e.g.*, ABA Report, *supra* note 68, at 20. Since the Committee on Rules of Practice and Procedure in its February 1979 revision dropped the proposal to limit interrogatories by local rule, we do not know the Committee's rationale, or whether it has taken advantage of local experience, because no comments were printed on proposals that were dropped. However, the earlier Preliminary Draft of March 1978 had converted the ABA proposal for a uniform national rule into a new proposal that authorized local rules to limit interrogatories. The Committee made specific reference to local conditions that might govern the choice among courses of action and requested the views of bench and bar on the point. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Mar. 1978) (Committee on Rules of Practice and Procedure, Judicial Conference of the United States).

129. Oral reports to the author by judges in the Northern District of Illinois, the District of Maryland, and the Southern District of California.

130. *E.g.*, W.D. PA. R. 34(d).

> defendants of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and 4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice.[131]

To prevent these abuses, the *Manual* recommends that courts limit communications between parties and their attorneys in a class action and actual or potential members of the class who are not formal parties to the suit.[132] The *Manual* also provides a "model" rule and order prohibiting the types of communications listed above and allowing some others.[133]

Pursuant to the *Manual's* recommendation, eleven districts have

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131. MANUAL FOR COMPLEX LITIGATION 27 (West 1977) [hereinafter cited as MANUAL].

132. *Id.*

133. Suggested Local Rule No. 7 states:

> In every potential and actual class action under Rule 23, F.R. Civ. P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, Fed. R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.
>
> This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein. Nor does the rule forbid communications protected by a constitutional right. However, in the latter instance the person making the communication shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

Id. at 187-88.

promulgated rules that limit communication between actual and potential parties to a class suit.[134] These rules have varied in scope from those that adopt the Suggested Local Rule No. 7 in the *Manual* verbatim, to those that are broader, and in effect prohibit all communication between parties and non-parties without obtaining leave of court. Local rule 34(d) of the Western District of Pennsylvania was of this type prior to its invalidation.

Rules and orders prohibiting communication in class suits have been attacked as being contrary to the policy underlying rule 23, and as being unconstitutional prior restraints upon freedoms of speech and association. In *Rodgers v. United States Steel Corp.*,[135] the Third Circuit Court of Appeals struck down rule 34(d) of the Western District of Pennsylvania, which prohibited any communication between parties, or their attorneys, and potential class members not party to the suit without prior court approval.[136] The court in *Rodgers* distinguished between the rule's effect upon litigants before and after class determination had been made. The court held only that the restraint imposed by rule 34(d) was outside the rulemaking power of the district court in that it required prior judicial approval of communications that seek to encourage common participation in a lawsuit.[137] Local rule 34(d) was thus found to be outside the scope of the rulemaking power granted by rule 83 because of its inconsistency with the purpose of rule 23.[138] The court declined to address the issue of whether rule 34(d) was an unconstitutional prior restraint on the plaintiff's rights of freedom of speech and association.[139] The court also did not address the validity of rule 34(d) when applied to a class that had already been determined.[140]

Two years later, in *Coles v. Marsh*,[141] the Third Circuit considered a court-imposed restraint upon communications between formal and potential parties to a class suit. In *Coles*, the trial court, upon defendant's motion, had entered an order prohibiting certain communications between the plaintiff, her attorney, and third parties, including potential members of the class.[142] The order of the court was taken in sub-

134. S.D. FLA. R. 19(b); N.D. FLA. R. 17(b); M.D. FLA. R. 4.04(e); N.D. GA. R. 221.2; N.D. ILL. R. 22; E.D. LA. R. 2.12(e); D. MD. R. 20; S.D. OHIO R. 3.9.4; S.D. TEX. R. 6; N.D. TEX. R. MISC. 688; W.D. WASH. R. 23(g).

135. 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

136. *Id.* at 166.

137. *Id.* at 164.

138. *Id.*

139. *Id.*

140. *Id.*

141. 560 F.2d 186 (3d Cir. 1977).

142. *Id.* at 187.

stantial part from Sample Pretrial Order No. 15 as set out in the *Manual*.[143]

Defendant's motion for the order was based upon plaintiff's deposition testimony that she had contacted present and former employees of defendant with the hope of interesting them in her employment discrimination suit. She also testified that she intended to continue this activity.[144] In vacating the order, the Third Circuit Court of Appeals stated, "[w]e do not accept the idea expressed by the defendant that plaintiff's activities represent abuses of the class action device. Rather, plaintiff's activities were directed toward effectuating the purposes of Rule 23 by encouraging common participation in the litigation of her sex/race discrimination claim."[145] Basing its decision on *Rodgers*, the

143. *Id.* at 188. The MANUAL also provides Sample Pretrial Order No. 15, which states:

> In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.
>
> This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or a prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.
>
> If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.
>
> A hearing at which applications may be presented for relaxation of this order and proposed communications with actual or potential members of the class is hereby set for —— at —m.
>
> Dated this ——day of ——, 19——.

Sample Pretrial Order No. 15, MANUAL, *supra* note 131, at 188-89.

144. 560 F.2d 186, 189 (3d Cir. 1977).

145. *Id.*

court held that the district court lacked the power to impose any restraint on communication for the purpose of preventing the recruitment of additional parties or the solicitation of financial or other support.[146] Such an order would be upheld only where the moving party articulated the particular abuses by which it was threatened and the court found a satisfactory basis for relief consistent with the policies of rule 23.[147]

Rule 2.12(e) of the Eastern District of Louisiana, which incorporates the exact language of Suggested Local Rule No. 7, was upheld as consistent with the policy of rule 23 in *Waldo v. Lakeshore Estates, Inc.*[148] In *Waldo*, the defendant moved to have plaintiff's class action dismissed on the ground that plaintiff violated rule 2.12(e).[149] Whether rule 2.12(e) had in fact been violated was referred to a special master, whereupon the plaintiff moved to have the rule declared invalid on the grounds that it violated the first and fifth amendments and exceeded the court's rulemaking authority.[150]

While recognizing that rule 2.12(e) did limit the exercise of certain rights otherwise guaranteed by the first amendment, the court found that these rights were "properly limited pursuant to sufficiently important governmental interests."[151] However, this determination was made on the basis that rule 2.12(e) *was not* a "prior restraint," and thus the court did not examine the rule with a "heavy presumption" against its validity.[152] The court also considered whether the rule as drafted "needlessly restrained" the freedoms protected by the first amendment. Plaintiffs alleged that specific abuses should be matched with specific prohibitory rules, as opposed to adopting an across-the-board restriction. In rejecting this line of attack, the court noted that the likelihood of drafting a rule which would specifically address all potential abuses was extremely dubious as a practical matter.[153]

After disposing of the plaintiff's contention that rule 2.12(e) violated the fifth amendment, the court addressed the claim that rule 2.12(e) exceeded the rulemaking power of the district court. Recognizing that *Rodgers* had determined that a similar rule was inconsistent with rule 83, the court stated:

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146. *Id.*
147. *Id.*
148. 433 F. Supp. 782 (E.D. La. 1977).
149. *Id.* at 786.
150. *Id.* at 787.
151. *Id.* at 788.
152. *Id.* at 789.
153. *Id.* at 791.

> [w]e categorically oppose the notion that a policy allowing unfettered communication to encourage participation in a class suit is consistent with the purpose of Federal Rule 23. The potential abuses attendant upon such unregulated communication clearly undermine the efficacy of the class action device. By proscribing such communications as tend to solicit legal services and/or fund contributions, the rule protects the right of the class membership to judicial redress that is not unnecessarily burdened. By foreclosing unapproved notices of the right to opt out and preventing misrepresentations of the lawsuit's status, purpose or effect, the membership's entitlement to a fair trial is safeguarded . . . . We therefore regard Local Rule 2.12(e) as entirely consistent with and in furtherance of the purpose of fully and fairly disposing of class-wide claims and remedying class-wide grievances in a single proceeding.[154]

A similar approach was recently adopted by a divided panel of the Fifth Circuit, but then was rejected by the full court en banc; the en banc court was upheld by the Supreme Court. In *Bernard v. Gulf Oil Co.*,[155] the panel majority said,

> [a]ny communication between parties and class members may mislead the class members by appearing to reflect the opinion of the court rather than that of the party making the communication . . . . Thus, there are many substantial reasons a trial judge may believe that an order such as that suggested in the Manual on Complex Litigation is justified.[156]

Judge Godbold dissented because he believed the restraints imposed by the court "contravene Rule 23 . . . and violate freedom of speech and freedom of association as guaranteed by our Constitution."[157] He sustained this view in writing for the majority of the en banc court.

Those who have commented on local rules that limit communication in class action suits generally favor the approach taken by the Third Circuit and the Supreme Court and the Fifth Circuit en banc in *Bernard*. A Note on the *Rodgers* case states,

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154. *Id.* at 794. It should be noted that this court was passing on the validity of its own rule, an anomalous situation that is common in the local rule context. *See* WEINSTEIN, *supra* note 2, at 126.

155. 596 F.2d 1249 (5th Cir. 1979), *rev'd in part*, 619 F.2d 459 (1980) (en banc), *aff'd*, 101 S. Ct. 2193 (1981).

156. *Id.* at 1260.

157. *Id.* at 1263 (Godbold, J., dissenting).

> the court is correct that local rule 34(d) is inconsistent with federal rule 23. The minimum purpose of rule 23 is to allow adjudication in a single action of claims which meet the rule's requirements. A broad ban on communication with absent class members creates obstacles to class litigation in two ways. First, it prevents representative plaintiffs and their attorneys from obtaining from absentees information necessary to demonstrate the appropriateness of class certification and to prove the merits of their claims. Second, the rule prevents class representatives from gathering "front money" necessary to pay for attorney's fees, notice expenses, and other litigation costs.[158]

Further, the Note points out that traditional concepts of unprofessional solicitation, which such rules are meant to prevent, may not be appropriate in class suits.[159]

Other commentators suggest that limited categories of forbidden communications be established, and the class attorney or class opponent be required to file a copy of any communication with the court before disseminating it to the class.[160] Courts screening these communications would limit their inspection to a search for "blatantly abusive" communications that are likely to cause irreparable injury unless restrained in advance of dissemination. The court could rely on opposing counsel to bring to light any other suspect communications and then hold a hearing to establish whether there was a violation of the restrictions. If a violation were established, the court could order the offending party to distribute corrective notices to the class, in addition to taking any other appropriate disciplinary action. This position seems to be substantially in accord with the Third Circuit's mandate in *Coles* that the party requesting a restraint on communication show the potential abuses that he seeks to curb before an order restraining communication can be issued by the court.[161]

The Southern District of Texas amended its broad restriction on

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158. Note, *Rules of Civil Procedure—Local Rule Barring Communications with Absent Class Members Held Beyond Rulemaking Authority of District Courts*, 88 HARV. L. REV. 1911, 1917-18 (1975) [hereinafter cited as Harvard Note]. Another valuable note on this case is Note, *Federal Procedure—Class Actions*, 43 FORDHAM L. REV. 1086 (1975).

159. Harvard Note, *supra* note 158, at 1918. *Cf.* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972) (court said, in an atypical fact situation, that it is not necessarily improper to seek out potential class members before filing a complaint).

160. Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1602 (1976) [hereinafter cited as *Developments—Class Actions*].

161. *See* text accompanying notes 141-46 *supra*.

communications in class actions in October, 1976.[162] The amended rule prohibits only communications that deal with the four potential abuses enumerated in the *Manual*. All other communications are allowed, but notice of any communication must be filed with the court five days prior to its dissemination so that the court can prohibit any communication found to be improper.

Thus, local rules restricting communications in class action suits are of questionable validity. Rules that are broader in scope than the *Manual's* Suggested Local Rule No. 7 are contrary to the policy underlying rule 23, but none of the rules in force among the district courts is of this type. The rules that follow the *Manual's* suggestion are also potentially troublesome. This situation exposes a policy dispute to the national rulemakers, including Congress.[163] Rule 23 has been found, through experience in the courts implementing it, to permit or encourage behavior apparently indistinguishable from common law solicitation. Court efforts to control this and related "abuses" undermine the rule's operation[164] and may even be unconstitutional. The local rules have exposed the problems and have provided experience in attempting to solve it so that future action on class communications will be better focused and more informed.[165]

4. Pretrial procedure

The local rule experience offers guidance in another area in which a common local rule has been found invalid, that of pretrial procedure under rule 16.[166] This is an area peculiarly suited to administration by local rule, as the original rulemakers indicated both in the rules them-

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162. S.D. TEX. R. 6.

163. There have been numerous proposals involving rule 23. *See Developments—Class Actions, supra* note 160, at 1623-44.

164. A noted authority, responding to this dilemma, asks, "why should 'solicitation' by an attorney—absent any coercion or deception—be condemned . . . ?" Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 666 n.16 (1979) [hereinafter cited as Miller].

165. It should be noted that local rules based on suggestions in the MANUAL draw upon a lengthy process of notice and comment not unlike the activity surrounding the birth of a new national rule. The latter has been compared to the gestation of an elephant: "First there is a great deal of movement by large bodies. Several years later, a birth occurs." A more precise description can be found at 4 WRIGHT & MILLER, *supra* note 12, at §§ 1005, 1007. *See* note 215 *infra*.

166. McCargo v. Hedrick, 545 F.2d 393, 400-02 (4th Cir. 1976) (Northern District of West Virginia Rule 2.09, which provided for dismissal of action not brought to trial within 12 months, held invalid). For a detailed discussion of this case, see McDermott, *The Pretrial Order and* McCargo v. Hedrick: *Effective Management or Unproductive Formalism?* 4 JUST. SYS. J. 245 (1978).

selves and in their contemporary comments about them.[167] Rule 16[168] is one of the few that specifically suggests a local rule,[169] a fact duly noted by Judge Charles Clark in responding to a question on the subject:

> The question is on Rule 16: Is that to be provided for by local rules or by the court in individual cases? The answer is that it is to be done by the court either in individual cases or by establishing a pre-trial calendar by rule. You will notice that whenever, in the rules, we provide for general local rules, it is referred to explicitly.[170]

In a somewhat broader context, Mr. Mitchell said, "[t]he [federal] rules do not apply to calendar administration . . . . The conditions differ widely in the country and that is left to local district court rules."[171]

Rule 16 has not been amended since it was promulgated in 1938, although practice under the rule is more complex than was contemplated when it was drafted. Most current practice appears to be consistent with the rule and to serve its broad purposes, although lawyers often complain that courts' requirements are counterproductive and judges sometimes make excessive and unnecessary demands. However, in some respects, present practice has extended the rule so far that it no

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167. *See* Report to the Judicial Conference of the Committee on Local District Court Rules 8 (1940) [hereinafter cited as Knox Report]. The committee notes, for example, that techniques for calendar management suitable for large courts will not be suitable for smaller courts.

168. Rule 16 of the Federal Rules of Civil Procedure provides:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
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> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
>
> (6) Such other matters as may aid in the disposition of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

169. The last sentence states: "The court in its discretion may establish by rule a pre-trial calendar . . . ." *See* note 168 *supra*.

170. ABA INSTITUTE (Wash. D.C.), *supra* note 4, at 71.

171. ABA INSTITUTE (N.Y.), *supra* note 4, at 231.

longer serves the essential purpose of advising attorneys. Local rules, however, provide the only source of information about a bewildering variety of preliminary conferences, scheduling conferences, and final pretrial conferences, each of which is the subject of different and sometimes conflicting requirements by different judges and courts.[172]

Despite the problems with local rules, convincing evidence indicates that judicial case management under rule 16 is the best hope available for controlling the duration and possibly the expense of civil litigation.[173] Perhaps rule 16, therefore, should be amended to better describe contemporary practice and to relieve the present burden on local rules. Changes that would alleviate many of the problems associated with pretrial local rules include: (1) explicitly providing for an early conference at which a schedule would be agreed upon and any problems ironed out;[174] (2) assigning a responsibility to the court to assure an expeditious schedule to complete the case; (3) listing requirements to be imposed in most cases, for preparation of the proposed pretrial order; and (4) outlining specific sanctions for failure to comply with the pretrial order. If rule 16 is amended, the ninety-five district courts have gathered vast experience with alternative pretrial techniques that can guide the national rulemakers.[175]

5. Press conduct

The common local rule regulating press conduct has also been attacked as invalid. Local district court rules that address the fair trial/free press issue proliferated in the years following the Supreme Court's decision in *Sheppard v. Maxwell*,[176] in which the Court stated that local courts must take "strong measures"[177] to ensure that pretrial publicity does not prevent a fair trial. Justice Clark, in dictum, stated that "the courts must take such steps by rule or regulation that will protect their processes from prejudicial outside interference."[178] This statement prompted eighty of the ninety-five district courts to adopt

172. Some flavor of this diverse practice can be gathered in Cohn, *supra* note 12; Flanders, *supra* note 30. The proliferation of pretrial rules has been attacked in Kahn, *supra* note 5, at 34.

173. *See* note 66 *supra*.

174. *See* Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135, 140-41 (1978).

175. This experience was used by the Wisconsin Supreme Court when it promulgated a pretrial rule in 1974. WIS. R. CIV. PROC. 802.10, 67 Wis. 2d 585, 637 (1975).

176. 384 U.S. 333 (1966).

177. *Id.* at 362-63.

178. *Id.* at 363.

local rules restricting the reporting of proceedings by the press.[179]

After *Sheppard*, the district courts were armed by the bench and the bar with a variety of proposals to implement Justice Clark's suggestion.[180] Many of the present fair trial/free press local rules reflect the guidelines and specific recommendations contained in the Kaufman Report, prepared by the Judicial Conference of the United States in 1969. Not surprisingly, the cases in which fair trial/free press rules have been challenged concern Kaufman Report progeny.

In *United States v. CBS*,[181] district court orders that forbade the sketching for publication of court proceedings, either inside the courtroom or from memory outside the courtroom, were held to be constitutionally impermissible. Though made pursuant to Northern District of Florida Rule 16, the orders in question conflicted with an express caveat of the Kaufman Report which stated that "[t]he committee does not presently recommend any direct curb or restraint on publication by the press of potentially prejudicial material. Such a curb, it feels, is both unwise as a matter of policy and poses serious constitutional problems."[182] The court noted in passing that only three of the eighty district courts which have fair trial/free press rules have adopted the suggestion in the Kaufman Report that in certain widely-publicized cases the court may direct that "no photograph be taken or sketch made of any juror within the environs of the court."[183]

In *Chicago Council of Lawyers v. Bauer*,[184] Northern District of Illinois Local Criminal Rule 1.07, which was substantially similar both

179. *See* Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55 (1976).

180. *See, e.g.*, NEW YORK CITY BAR ASS'N, SPECIAL COMM. ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE, FREEDOM OF THE PRESS AND FAIR TRIAL (1967) (Medina Report); ADVISORY COMMITTEE ON FREE TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (approved draft, 1968) (Reardon Report); ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, RECOMMENDED PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (rev. draft, Nov. 1975); Judicial Conference of the United States, *Report of the Committee on the Operation of the Jury System on the "Fair Trial-Free Press" Issue* (Kaufman Report), 45 F.R.D. 391 (1969) (amended, 51 F.R.D. 135 (1970)) [hereinafter cited as Kaufman Report].

181. 497 F.2d 102 (5th Cir. 1974).

182. 45 F.R.D. at 401-02.

183. 497 F.2d at 106 n.5.

184. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976). For a lengthy discussion of *Bauer* and of fair trial/free press issues generally, see Note, *ABA and Local Court Disciplinary Rule's Standards for Prohibiting Attorney Comments on Pending Investigations or Litigation Violate First Amendment Protections*, 51 NOTRE DAME L. REV. 1234 (1976); Note, *Trial Publicity Rules*, 54 TEX. L. REV. 1158 (1976).

to the Kaufman recommendations and to Disciplinary Rule 7-107(A)-(E), was held to be an unconstitutionally overbroad restriction of lawyers' first amendment right to comment publicly and receive comment on pending litigation. The court stated that local rules restricting public access to information on pending litigation will be scrutinized less closely than quintessential "prior restraints," but more closely than legislative restrictions.[185] In restricting the flow of information to the public, local rules are to exhibit "clearness, precision, and narrowness."[186] The court ruled that only those comments that pose a "serious and imminent threat" of interference with the fair administration of justice can constitutionally be proscribed pursuant to local rule.[187] Rule 1.07 had proscribed public comments which merely exhibited a "reasonable likelihood" of interfering with a fair trial or of otherwise prejudicing the due administration of justice.[188]

It seems that present fair trial/free press rules, based on the carefully considered recommendations of the Judicial Conference and the Bar, do much to ameliorate the inherent tension between first and sixth amendment rights. Court orders that embellish or go beyond the sweep of the fair trial/free press rules carry the risk of impinging on these constitutional rights.[189]

6. Attorney behavior

A final serious conflict posed by local rules appears in the efforts of some courts to regulate attorney behavior.[190] The authority of the district courts to promulgate rules governing admission to the bar is derived from legislative grants of power[191] and inherent judicial power.

185. 522 F.2d at 248-49.

186. *Id.* at 249. *See* Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970) (citing Craig v. Harvey, 331 U.S. 367 (1947)), in which the court invalidated a provision of Northern District of Illinois Rule 34 that extended the court's rule concerning television coverage and photographs to floors of the federal building above and below the courtroom area.

187. 522 F.2d at 249 (citing Chase v. Robson, 435 F.2d 1059, 1061-62 (7th Cir. 1970), which formulated a restrictive constitutional standard for examining local rules that proscribe first amendment rights).

188. 522 F.2d at 249.

189. The Supreme Court's recent decision in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), which held that a reporter does not have a right of access to pretrial procedures in criminal cases, changes the complexion of case law on the fair trial/free press issue. Its impact on rulemaking in this area, however, is as yet unclear.

190. *See generally* 12 WRIGHT & MILLER, *supra* note 12, at 228-29.

191. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein." 28 U.S.C. § 1654 (1976).

The Supreme Court in *Ex parte Secombe*[192] held that it rests "exclusively with the court to determine who is qualified to become one of its officers."[193] Subsequent cases have affirmed a state's right to prescribe conditions for membership in the bar.[194] In *Brown v. Supreme Court of Virginia*,[195] the general principle was outlined:

> [T]he highest court of a state may prescribe rules relating to admission to the bar even in absence of a statute. The admission or exclusion of an attorney is not the exercise of a mere ministerial power. It is the exercise of judicial power and the admission of an attorney may, with propriety, be entrusted to the courts.[196]

The Knox Committee Report[197] on local district court rules determined that rules governing attorney admission fall specifically within the intended scope of rule 83. The authors of the report expressed the view that completely uniform rules were "neither feasible nor desirable" though they advised that "supplementary local rules be kept at a minimum."[198] Even critics of local rules have acknowledged that procedures for admission to the bar are satisfactorily within the confines of rule 83.[199]

Because the courts clearly have authority over admission to practice, the issue is what standards the courts may impose. The Knox Report proposed a model rule for the eligibility of attorneys: "Any person who is a member in good standing of the bar of (1) the highest court of this state or of (2) the highest court of any other state, is eligible for admission to the bar of this court . . . ."[200] The Northern District of Oklahoma Rule 5(c) typifies local rules that follow the Knox proposal in that it requires that a person be a member of the bar of the Supreme Court, a United States Court of Appeals or District Court, or of the highest court of any state. Other district courts, however, stipulate that an attorney must be a resident of the state.[201] At least one circuit has held that the requirement that applicants for admission to the bar be

192. 60 U.S. (19 How.) 9 (1856). *Accord, Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

193. 60 U.S. at 13.

194. *See, e.g., In Re* Summers, 325 U.S. 561 (1945); Emmons v. Smitt, 58 F. Supp. 869 (E.D. Mich. 1944), *aff'd*, 149 F.2d 869 (6th Cir. 1945).

195. 359 F. Supp. 549 (E.D. Va. 1973), *aff'd sub nom.* Titus v. Supreme Court of Virginia, 414 U.S. 1034 (1973).

196. 359 F. Supp. at 554 (citing *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866)).

197. *See* note 167 *supra*.

198. Knox Report, *supra* note 167, at 7.

199. 12 WRIGHT & MILLER, *supra* note 12, at 220.

200. Knox Report, *supra* note 167, at 29.

201. *E.g.*, S.D. OHIO R. 2.4.2.

state residents is a "reasonable classification designed to serve the compelling state interest of preventing misconduct by itinerant or nonresident practitioners."[202]

Many districts also provide that in *pro hac vice* appearances, an out-of-state attorney must associate himself with a resident attorney. There are two justifications for this requirement: local counsel are needed because they are better acquainted with local court procedures, and joinder of local counsel permits the court to have a member of its bar professionally responsible for litigation. Despite criticisms of these justifications, it has been held that permission to appear *pro hac vice* is not a right, but a privilege.[203]

Local rules requiring joinder of local counsel, however, cannot be applied when they deny a party access to the federal courts. Accordingly, a local rule should be waived or admission *pro hac vice* granted when an out-of-state attorney cannot find a local attorney who will sign the pleadings with him.[204] Nor can it be applied when the result will be to preclude the appearance of out-of-state attorneys in civil rights actions.[205]

In an attempt to exclude out-of-state counsel, a district court in Alabama advanced the following rationale for a local rule dealing with representation by counsel in civil rights cases:

> [B]eing aware not only of the legal but of the social problems involved in the cases filed and prosecuted in this Court that have as their basis the alleged violations of civil and constitutional rights, [the Court] is of the opinion that it is not in the public interest nor in the Court's interest for the Court to continue to permit litigants to employ or utilize counsel in this field of litigation when all parties are not actively represented by counsel that reside in this district, as has been the practice heretofore followed in some instances. This Court is of the further opinion that such a practice does not make for the proper and efficient administration of justice and tends to make this Court's burden in this type of litigation more difficult in that assistance to the Court is not immediately and

202. Tang v. Appellate Div., N.Y. Sup. Ct., 373 F. Supp. 800, 801 (S.D.N.Y. 1972), *aff'd*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

203. Thomas v. Cassidy, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied sub nom.* Fitzgerald v. Cassidy, 355 U.S. 958 (1958).

204. Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5th Cir. 1964).

205. Sanders v. Russell, 401 F.2d 241, 247 (5th Cir. 1968). The court's holding concerned "non-fee generating cases" but the court made it clear that attorneys may still seek a fee and have the rule apply in appropriate cases. *Id.* at 244 n.5.

> readily available from counsel actively participating in and fully cognizant of all aspects of said cases.[206]

This poorly-drafted local rule requires that whenever an allegation involving a violation of civil rights is to be heard,

> each litigant must have at least one legal representative of record who permanently resides in this district and is regularly admitted to practice before the Court, and who during all phases of the litigation should be personally aware of the various social and/or legal problems involved and will be fully informed as to all aspects of the litigation, and who has authority to speak for his client and will be readily available to the Court for assistance, counsel and advice. Said local counsel in all such cases including the United States Attorney for the Middle District of Alabama when said litigation concerns actions by or against the United States, shall appear and actively participate during all stages and phases of said litigation, including any proceedings deemed necessary by the Court to enforce its orders, degrees and judgments.[207]

Under the standards enunciated above for controlling appearances by out-of-state counsel, Alabama Rule 1 would fail.

A difficult question that is still unresolved concerns whether rules requiring that local counsel "actively associate"[208] or "meaningfully participate"[209] in the lawsuit deny a party access to the federal courts. It is uncertain what these phrases mean, but the following local rules offer some indications. The District of Idaho Rule 2(d) states that a resident "designee shall personally appear with non-resident attorney on all matters heard and tried before the court." The District of Montana Rule 1(c) requires that "local counsel must be furnished with all factual, evidentiary, and legal information necessary for him to intelligently act on behalf of the party he represents; and he must also be vested with full and complete authority to act on behalf of and bind the party he represents . . . ." Finally, Eastern District of Virginia Rule 7(D) provides that "no pleading or notice required to be signed by counsel shall be accepted by clerk unless signed by [resident] counsel." This rule was recently upheld in *Willis v. Semmes, Bowen & Semmes*.[210]

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206. M.D. ALA. R. 1.

207. *Id.*

208. D. ME. R. 3(d)(1); D. MINN. R. 1(d).

209. D. HAWAII R. 1(e); D. ORE. R. 3(c); D. COLO. R. 1(b).

210. 441 F. Supp. 1235, 1246 (E.D. Va. 1977).

D. *Miscellaneous problems*

Other local rules and procedures that have been criticized include those that provide for alternate jurors to be selected from regular juries only when a trial is complete,[211] those that modify the requirement of rule 5(d) that all discovery papers be filed,[212] those that provide for dismissals for want of prosecution if the suit has been inactive for a specified period,[213] and those that define the time when judgment is entered.[214] None of the attacks are persuasive, though local rules certainly can be found that suffer from poor drafting and other errors of detail.

III. Adoption of Local Rules

The courts' exercise of the local rulemaking power has been criticized for the method by which rules are drafted. District court performance in this regard is criticized especially for failing to meet the high standard set by the national process. Though subject to some criticism and reappraisal, the national rulemaking process is widely admired.[215] Proposed revisions of national rules have been widely

211. United States v. Viserto, 596 F.2d 531, 539-40 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979).

212. Cohn, *supra* note 12, at 290-91.

213. Columbia Note, *supra* note 3, at 1272-75. Local rules regarding dismissal for want of prosecution, which were questioned in *McCargo*, are well within the scope of the district courts' inherent powers. As stated in Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F.2d 825, 826 (10th Cir. 1948) (referring to District of Colorado Rule 8): "[a] district court of the United States is vested with power to dismiss an action for failure of plaintiff to prosecute it with reasonable diligence. The power is inherent and independent of any statute or rule." *See also* United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975). It is argued, however, that local rules on the subject are superfluous, especially in light of Federal Rule of Civil Procedure 41(b). *See* McCargo v. Hedrick, 545 F.2d 393, 396 n.3 (4th Cir. 1976) (citing Link v. Wabash R.R., 370 U.S. 626, 630 (1962)). There is also the danger that such local rules, if not superfluous, might be inconsistent with rule 41(b) or other federal rules. In Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538 (2d Cir. 1963), for example, provisions of Eastern District of New York General Rule 23 were found to violate the mandate of now-abrogated Federal Rule of Civil Procedure 77(d). *Id.* at 542.

214. *See* Columbia Note, *supra* note 3, at 1269-71.

215. *See* Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) [hereinafter cited as Hazard]; 4 WRIGHT & MILLER, *supra* note 12, at §§ 1005, 1007. Critics have focused on the dual role of the Supreme Court in promulgating and also reviewing rules. WEINSTEIN, *supra* note 2, at ch. IV. The limited opportunities in the past for public comment and discussion, and the occasional intrusion of rulemaking into areas that have the character of advisory opinions, have also been criticized. Justices Black and Douglas dissented from the orders promulgating rules on the grounds that revised rules are not really the Court's work. Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 865, 869-70 (1963). *See* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

circulated and commented upon, hearings have occasionally been held, and expert advice of scholars, practitioners and judges is available through the relatively diverse character of the advisory committees. The national rules are subject to searching scrutiny as they pass from an Advisory Committee to the Standing Committee on Practice and Procedure, to the Judicial Conference of the United States, to the Supreme Court, and finally to Congress. The role of Congress is especially significant because elected officials may intervene in this otherwise undemocratic process[216] if they believe the rulemakers have stepped beyond the technical, procedural tasks assigned them[217] and have begun to intrude into substantive areas.

We are told that the district courts have undertaken an essentially similar task without the searching examination, expertise, or scrutiny appropriate to it.

> [T]he process by which local rules are made is simply not suited for the complex and controversial subjects to which many local rules are addressed. When the Civil Rules are amended, the process is extremely careful. . . . The process is calculated to ensure that any changes reflect the best thinking of the entire profession.
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> That process on the national scene is in striking contrast to the way in which local rules are made. In a few districts a committee of local practitioners is consulted but this is the exception rather than the rule.[218]

Judge Weinstein adds:

> [T]he subject matter of local rulemaking continues to expand as local judges exercise their fertile imaginations to deal with perceived problems. . . . Mere publication is probably not enough. Members of the bar will generally not respond unless committees of the bar associations have studied the matter or the court itself appoints a committee or reaches out to invite persons who should be interested to attend a public hearing. The meetings of the circuit conferences have sometimes been used to good effect in this connection. Our experience in the Eastern District of New York, where most rules are published before adoption, is that almost no communica-

216. The process has been aptly characterized by Professor Hazard, *supra* note 215.

217. While it has been argued that rulemaking is an inherent power, Judge Weinstein is persuasive in arguing that federal rulemaking can no longer be understood otherwise than as legislative delegation. WEINSTEIN, *supra* note 2, at 47-48.

218. 12 WRIGHT & MILLER, *supra* note 12, at 220.

> tions are received unless pointed questions are put to individuals and associations. In the Northern District of Illinois the experience has been similar.[219]

But is the character of the local rulemaking task similar to that of the national bodies? Judge Weinstein distinguishes rulemaking from the normal tasks of a court in this way:

> Rule-making by federal courts represents a reversal of usual adjudicative patterns. In most instances a court acts in controversies based upon particular facts on a case-by-case basis, leaving subsequent decisions to synthesize general substantive and procedural rules. At the level of national federal rule-making, the Supreme Court lays down general standards applicable to all future cases without the aid of individual fact situations and argument. The Court does not have before it interested parties with a motive for presenting the case fully, as it does in litigation meeting constitutional justiciability requirements. In rule-making the Court makes legislative pronouncements reviewed by Congress—a departure from the usual instance where congressional legislation is measured and interpreted by the courts in the light of constitutional and other requirements. In normal adjudications the Court's power is based upon the Constitution, although that power is limited and proscribed by jurisdiction, venue, and other provisions enacted by Congress. In rule-making the Court's power is granted by Congress under specific limitations; having accepted that grant for many years it is doubtful whether the Court could claim inherent power were general rule-making power circumscribed. Usually a court is concerned with due process and the opportunity for those concerned to be heard publicly, whereas in rule-making a court generally acts *in camera* without providing an opportunity for argument.
>
> Where the courts utilize a litigation to pronounce broad general principles and detailed regulations, such as the *Miranda* rules designed to control police interrogations in a quasi-legislative manner, the courts are subject to the restrictions imposed by judicial tradition. Such cases involved the concreteness of a litigated matter with specific facts presenting the issue and with opposing counsel strenuously arguing different points of view. Public argument is normally afforded

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219. WEINSTEIN, *supra* note 2, at 129-30.

> and briefs by the parties and by amici may be submitted. The court is obligated to justify its decisions by a reasoned opinion. Moreover, the possibility exists of relatively easy modification through future interpretations and legislation, though change becomes awkward when the decision is justified by constitutional imperatives.[220]

If we follow Judge Weinstein and approach local rules as an exercise in legislation using delegated authority, the procedures employed surely must meet a very high standard. But consider what courts do in this area. When a court codifies its practice into a rule on supersedeas bonds like that of Rhode Island,[221] the notion of "legislation" is exaggerated if it must accommodate this sort of activity. Much local rulemaking differs from legislation in its source, its scope, and its relevant constituency. Its source is the experience with internal operation of the court itself, supplemented as appropriate by ideas from lawyers and other courts. Legislation may draw upon almost any aspect of human experience, while national rulemaking is less global because of its exclusive focus on legal procedure. The rulemakers may consider basic policy choices informed by relevant experience. The scope of local rulemaking is further limited to matters or procedures not preempted by national rules, and to lawyers and litigants before a single court. Local rules also differ from legislation in that the practical constituency cannot be broader than the active bar of one court. While clients, foreign lawyers and non-litigants may be affected, it is impractical to attempt to canvass their views, because these people will largely be represented through the influence of lawyers in the district. No one else has a sustained interest.

Sometimes courts do more than codify practice when they write rules. They consider alternative policies, choose one, and then codify it in a rule. Much of this might be characterized as a rather mundane sort of managerial policy making, not legislation. When judges discuss rules involving pretrial procedures, for example, it is in the context of considering alternative policies for running their courts. Wise consideration of these alternatives often requires consultation because so many policies involve the activity of lawyers.[222] A wise manager in any organization will solicit views of all participants before embarking on a major policy change, so also a court must understand the consequences

220. *Id.* at 4-6 (footnotes omitted).

221. *See* text accompanying notes 44-50 *supra*.

222. In matters like pretrial procedure, lawyers' work is an integral part of the court's work. *See* note 29 *supra*.

of present and proposed policies. Such action has a narrower scope of applicability than almost any legislation, however. If we take literally the principle that lawyers are officers of the court, these local rules appear to be matters of internal operations only. In the degree that a proper rule goes beyond these "officers" to their clients, it normally has the effect only of codifying what would have occurred without the rule.

What are the usual procedures for adopting a local rule? A very limited survey indicates that Weinstein, Wright and Miller and other critics may be wrong in their characterization of the process. Nearly all clerks contacted in a telephone survey conducted in the spring of 1979 reported that regular bar consultation is usual.[223] In at least three recent instances, bar committees have undertaken drafting of a complete revision of local rules.[224] Many courts work closely with bar association groups.[225] On the other hand, bar participation was very limited in an extensive revision of the local rules in the Southern District of New York.[226]

It appears that the critics have overdrawn the attack on local rulemaking procedures, just as the attack on the rules' substance has

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223. Thirteen districts were contacted by Barry Groce through telephone calls to the clerks of the respective courts. Districts surveyed were N.D. Cal., D. Conn., D.D.C., S.D. Fla., N.D. Ga., N.D. Ill., E.D. La., E.D. Mich., M.D.N.C., D. Ore., W.D. Tex., W.D. Wash., and N.D. W. Va. The author summarized his conclusions as follows:

> All districts surveyed maintained some form of bench/bar interaction with respect to the drafting of local rules. Several districts consulted with a special bar committee, while others maintained informal communication with bar members. . . . Still other districts sought bar input only for major rule changes, keeping "house keeping" matters to themselves.
>
> About one-half of the districts surveyed utilized bar participation in drafting their local rules. In one district, (N.D. Cal.) a local bar committee was presented with old local rules and asked to submit a revised version. Other districts use members of the bar on the court's rule drafting committee.
>
> Few districts held formal hearings or published their proposed rules prior to adoption. In some instances meetings between the court and members of the bar were used. Only one district (N.D. Cal.) published all of its proposed rules prior to adoption. Another (N.D. Ill.) published only "major revisions." Others did not publish rules but made an effort to circulate a draft of the rules to select members of the bar.
>
> In all districts having more than a handful of judges there was a special committee set up to consider local rules. Some committees are made up exclusively of judges, while others are composed of both judges and bar members.

B. Groce, Reforming Local Rules of the United States District Courts (May 24, 1979) (unpublished paper at University of California, Berkeley).

224. *See* note 5 *supra*.

225. *See, e.g.*, the outstanding work of the Committee on Federal Courts, New York City Bar Ass'n, on use of magistrates, implementation of the Speedy Trial Act, and other matters of management of the federal courts in New York City. *See* 33 REC. N.Y. BAR ASS'N 212, 510 (1978).

226. The revision was conducted in October, 1980.

been overdrawn. No one is yet in a position to say precisely how much public or expert involvement is typical. Presumably, many courts employ more elaborate procedures for a general revision of their rules, or for a change they regard as important, than for a single, technical modification. If we consider together all revisions of any rule, no matter how minor, Judge Weinstein may be overly broad in his observation that "[l]ack of public debate and publication of local rules before adoption is typical,"[227] although this no doubt is true of a slight majority of all revisions. Nothing in the Knox Report or elsewhere in the early history of rule 83 requires that more than "a majority of judges" participate in local rulemaking. Evidently, however, we live in an age of increased demand for broad participation in decisions of public and private bodies.[228] Clearly, participation by experienced practioners and by scholars can be valuable in major revisions.[229] When a court is codifying what it is already doing, however, perhaps there is little need for any participants other than judges.

IV. THE SCOPE AND USE OF LOCAL RULES

One of the barriers to understanding the place of local rules in the structure of governance of the judiciary is the difficulty in obtaining a grasp on the present scope of the enterprise. The local civil rules total about one and one-half million words in two large loose-leaf volumes.[230] There are at least six rules or statutes that require courts to promulgate local rules[231] and four more contain suggestions.[232] In ad-

227. WEINSTEIN, *supra* note 2, at 129. In notes 460, 461, and 462, Judge Weinstein indicates that he relies heavily on some speculations I advanced in 1976 at his request, in drawing a dark picture of the process. I had no special knowledge of local rule procedures at the time of the correspondence quoted.

228. This is true for some excellent reasons in the specific context of rulemaking. *See* Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration*, 62 JUDICATURE 280 (1979).

229. *See* 12 WRIGHT & MILLER, *supra* note 12, at 220.

230. The Callaghan service does not include specialized rules dealing solely with criminal, bankruptcy, or admiralty matters.

231. 28 U.S.C. § 137 (1976) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."); 28 U.S.C. § 139 (1976) ("times [and places for court sessions] shall be determined by the rules or orders of the court."); 28 U.S.C. § 636 (b)(4) (1976) ("Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."); 28 U.S.C. § 1654 (1976) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."); FED. R. CIV. P. 40 ("The district courts shall provide by rule for the placing of actions upon the trial calendar . . . ."); FED. R. CIV. P. 78 ("Unless local conditions make it impracticable, each district court shall establish regular times and places . . . at which motions requiring notice and hearing may be heard and disposed of . . . .").

232. 28 U.S.C. § 1914(c) (1976) ("Each district court by rule or standing order may re-

dition, there have been many proposals and recommendations for local rules from national bodies, usually the Judicial Conference of the United States and its staff agency, the Administrative Office of the United States Courts, as well as the Federal Judicial Center, the American Bar Association and other bodies.[233] Responding to these initiatives and to their own predilections, some courts have many rules, some have few. In a recent speech on local rules, Professor Arthur R. Miller said, "[i]sn't it startling that in 1978—forty years after the federal rules took effect . . . forty years into the game, nobody knows what the shape of the ball is?"[234]

This section will summarize the general scope of local rules,[235] and may provide a sense of "the shape of the ball" not previously available.

1. Information

One group of local rules simply provides mundane information for lawyers about how, where, and when the court operates. Numerous rules describe the case assignment system.[236] Other local rules inform

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quire advance payment of fees."); FED. R. CIV. P. 16 ("The court in its discretion may establish by rule a pre-trial calendar . . . ."); FED. R. CIV. P. 66 ("The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts."); FED. R. CIV. P. 77(c) (court may provide by local rule for extended hours for the clerk's office).

233. See WEINSTEIN, *supra* note 2, at 490, for a "curious example of 'national' local rules": a model local rule on black lung cases proposed to all United States District Judges by the Director of the Administrative Office of the United States Courts, March 1, 1976. *See* text accompanying notes 274-79 *infra*, for additional examples.

234. *Conference on Rule Making*, *supra* note 5, at 494.

235. A "census" of all the local rules is beyond the scope of this article. Rather, certain key rules on particular topics will be the focus of discussion in combination with the lists of rules on particular topics that appear throughout this article. Local rules encompass such topics as: attorneys, divisions within a district, calendars, motions, pleadings, notification of a claim of unconstitutionality, orders grantable by the clerk, bonds, depositions, discovery, pretrial procedure, stipulations, continuances, dismissal for want of prosecutions, trial procedure, impartial medical examinations and testimony, exhibits, records and files, juries, costs, fees, motions for new trials, appeals, bankruptcy and receivership, and habeas corpus. These topics are discussed in *Local Rules Survey*, *supra* note 12. *See also* Appendix B, *infra*, which contains the system of numbering proposed for uniform adoption in the Ninth Circuit.

236. Several new rules have been promulgated in this once-dormant area since the controversy following assignment of the Chicago Seven trial to Judge Julius Hoffman. As a result of the court's random assignment procedure, the case was assigned to a judge who was obviously unsympathetic to the defendants' political beliefs and who was widely attacked as being biased against the defendants. Northern District of Illinois Rule 2.22 contains a complete description of the "Procedures for Filing and Assigning Cases." Rules 2.30 and 2.31 are similarly comprehensive regarding reassignments and related cases. *Cf.* E.D. WIS. R.

lawyers about where to file suits and papers,[237] detail the hours and operation of the various clerk's offices in the district, provide regulations that govern access to files and exhibits, or establish a "Motions Day,"[238] as required by Federal Rule of Civil Procedure 78. Other local rules assure a flow of substantive and procedural information in the other direction. Substantively, they require lawyers to notify the court when they intend to claim that a statute is unconstitutional.[239] Procedurally, they require lawyers to submit the name of a resident attorney upon whom papers may be served.[240]

2. Management

Local rules also play a vital role in the courts' efforts to manage themselves and their dockets.[241] The rules reflect a diverse policy and practice, which is, in substantial degree, both inevitable and desirable.[242] Some diversity is inevitable because state, district, and county boundaries are more important in the practice of law than in any other modern profession. The bar is organized by jurisdictions, and a lawyer's work is specific to a jurisdiction in a degree unheard of in professions such as medicine or engineering. Federal judges, for the most part, are products of the locations they serve.[243] Diversity is a necessity

4.01, which describes a less desirable system that randomly assigns cases to judges in a fixed sequence. This type of system is open to manipulation.

237. In a geographically large district this information may not be available otherwise. *See* note 27 *supra*.

238. *See* JUDICIAL CONTROLS, *supra* note 66, at ch. I.

239. This type of rule is praised in *Local Rules Survey*, *supra* note 12, at 1034-37. These rules enable the court to notify the Attorney General when an act of Congress is challenged and the United States is not a party, as required in FED. R. CIV. P. 24(a) and 28 U.S.C. § 2403 (1976). Examples of such rules may be found in: D. ARIZ. R. 35; E.D. & W.D. ARK. R. 18; E.D. CAL. R. 16; N.D. CAL. R. 8; D. COLO. R. 13; D. DEL. R. 21; S.D. FLA. R. 9; N.D. FLA. R. 6; E.D. ILL. R. 8; N.D. ILL. R. 22; S.D. ILL. R. 6; N.D. IND. R. 20; S.D. IND. R. 16; S.D. & N.D. IOWA R. 21; D. KAN. R. 12; M.D. LA. R. 11; W.D. R. 21; D. MASS. R. 23; D. NEB. R. 36; D.N.H. R. 22; D.N.J. R. 32; N.D.N.Y. R. 34; S.D.N.Y. R. 24; W.D.N.Y. R. 9; M.D.N.C. CIV. R. 20; D. ORE. CIV. R. 14; E.D. PA. R. 20; W.D. PA. R. 11; D.R.I. R. 27; E.D. WASH. R. 4; N.D. W. VA. CIV. R. 2.14; S.D. W. VA. CIV. PRO. R. 2.10; W.D. WIS. R. 11.

240. Rules requiring designation of local counsel upon whom papers may be served include: W.D. KY. R. 4c; W.D. LA. R. 4; D.N.J. R. 5; W.D. OHIO CIV. R. 2.03; W.D. TEX. R. 4.

The above provisions specifically deal with designation of resident counsel; these requirements may also be found in rules relating to admission to the bar: D. DEL. R. 4d; S.D. FLA. R. 16d; M.D. FLA. R. 2.02; N.D. OA. R. 71.41; N.D. & S.D. IOWA R. 5f; D. KAN. R. 4f; M.D. LA. R. 1e; D. ME. R. 3dl; D. Minn. R. 1d; D. NEB. R. 5q; D.N.H. R. 5b; E.D.N.C. R. 1e; M.D.N.C. R. 2d; D.N.D. R. 11D(2); N.D. OKLA. R. 5b; W.D. OKLA. R. 4h.

241. *See, e.g.*, CASE MANAGEMENT, *supra* note 30.

242. *See* Flanders, *In Praise*, *supra* note 12, at 32-33.

243. *See* H. CHASE, FEDERAL JUDGES: THE APPOINTMENT PROCESS (1972).

in federal courts so that they can respond not only to local expectations and practice but also to specific institutional demands. As one commentator stated:

> Because courts must respond to the environment in which they operate, they must remain flexible. Courts must be able to adjust to changes in case flow, particularly at the trial court level. The trial court is at the hub of a wheel which intersects with prosecutors' offices, private attorneys, litigants, juries, witnesses, lay groups, city and county governments . . . .[244]

Local rules are one of the main tools employed, though perhaps some alternatives might serve. When federal judges discuss procedural problems, the solutions suggested are very often formulated as suggestions to try specific local rules.[245]

Most controversial are the local rules that touch upon important provisions in the national rules. One prominent scholar has said that national rule 23 "really must be thought of as a procedural skeleton requiring fleshing out by judges and lawyers . . . ."[246] One way this has been achieved is through rulemaking in narrow areas, filling in the gaps in the national rules or providing a consistent interpretation to provisions found there. For instance, several districts have declared that five days will be considered "reasonable notice" for oral depositions under Federal Rule of Civil Procedure 30(a).[247] Oddly, the authors of the Columbia Note find this a reasonable bit of guidance, while criticizing this sort of interpretative rulemaking in other areas.[248] Also, the Knox Report and the authors of the Columbia Note find no objection to local rules setting requirements for the posting of security for costs:[249] "the natural response of the district courts to repeated mo-

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244. Saari, *Modern Court Management: Trends in Court Organization Concepts—1976*, 2 JUST. SYS. J. 19, 23 (1976).

245. As an illustration, fourteen specific suggestions for local rules appear in the original reprint of seminars for newly appointed United States District Judges, 1970-71. SEMINARS, *supra* note 6. Criticizing the legalistic approach judges sometimes take to administrative problems, one distinguished court administrator has said in a private conversation with the author that judges believe all that is necessary to solve a problem is to pass a rule; the problem, they think, will go away without any further effort. An alternative to local rules for disseminating administrative policy might be a published pamphlet of "internal operating procedures" separate from local rules.

246. Miller, *supra* note 164, at 677.

247. Notice periods vary under the local rules: D. KAN. R. 17b (5 days); M.D. FLA. R. 3.02 (10 days); D. COLO. R. 5a (5 days); D.N.M. R. 8a (10 days); W.D. & E.D. OKLA. R. 14 (3 days); N.D. OKLA. R. 15 (3 days); E.D. VA. R. 21g (7 days).

248. Columbia Note, *supra* note 3, at 1262.

249. Columbia Note, *supra* note 3, at 1267; Knox Report, *supra* note 167, at 49-50. Some

tions for security for costs was to pass local rules on the subject."[250]

Several courts have rules that provide for an assessment of juror and other costs, when a settlement occurs shortly before trial. In *Martinez v. Thrifty*,[251] a rule was upheld that assessed jury costs equally between parties unless the court was notified of the pretrial settlement before noon on the last working day before trial. Several courts have comparable provisions.[252] Last minute settlements inconvenience jurors who are called unnecessarily, and they waste valuable trial time because it is often impossible to schedule another trial soon enough to fill the time suddenly made available.[253] No strategic advantage will be gained from waiting for serious settlement negotiations until the last minute before trial that cannot be gained by waiting for a deadline imposed by local rules.

Less commendable are the local rules that create new "divisions" within a district. Congress has partitioned thirty-four of the ninety-five judicial districts into divisions. In all, 208 divisions are created by statute, and an additional forty-six have been created by local rule.[254] There is no discernible logic to either group of provisions, nor to the additional statutory provisions establishing places where court shall be held. Some large states, such as California and New York, have no statutory divisions and few statutory places where court is to be held, while some much smaller states have many of both.[255] District court local rules have not improved matters; they have disappointed the earnest hope of one commentator who recommended local rules rather than legislation because "the local courts are in a better position than Congress to determine the most equitable division of jurisdictional units for venue purposes."[256]

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districts require security bonds for non-residents, while others require bonds from poor persons.

250. Columbia Note, *supra* note 3, at 1267; Knox Report, *supra* note 167, at 49-50.

251. 593 F.2d 992 (10th Cir. 1979).

252. *E.g.*, D.N.M. R. 13e; D. COLO. R. 11; N.D. ILL. CIV. R. 11; W.D. LA. R. 5g; W.D. TENN. R. 6b; E.D. VA. R. 20c.

253. *See* CASE MANAGEMENT, *supra* note 30, at 52-53; SEMINARS, *supra* note 6, at 139-40 (remarks of Judge Alvin B. Rubin); Judge Rubin, *The Managed Calendar*, 4 JUST. SYS. J. 135, 144-45 (1978).

254. *See* Appendix A *infra*.

255. California, with its large population and area, has no statutory divisions and a total of only six places where court is regularly held in its four districts. Two additional divisions have been added by local rule. *See* Appendix A *infra*. The four districts of New York have no divisions of either variety and nine places where court is regularly held. By contrast, the three Alabama districts are divided into twelve statutory divisions, each with at least one active court location. The two Iowa districts have ten statutory divisions.

256. *Local Rules Survey*, *supra* note 12, at 1023.

Actually these local rules have clouded the application of venue statutes,[257] with little corresponding rationalization for the judiciary's

257. Venue in civil cases is governed by 28 U.S.C. §§ 1391, 1393, and 1404. The effect of sections 1393 and 1404 becomes lost if local rule divisions are equivalent in effect to statutory divisions. 28 U.S.C. § 1393 provides:

> (a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one *division* must be brought in the *division* where he resides.
>
> (b) Any such action against defendants residing in different *divisions* of the same district or different districts of the same State may be brought in any of such *divisions*.

(emphasis added). 28 U.S.C. § 1404 provides in relevant part:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district *or division* where it might have been brought.
>
> (b) Upon motion, consent or stipulation of all parties, any action . . . of a civil nature . . . may be transferred, in the discretion of the court, from the *division* in which pending to any other *division* in the same district.
>
> (c) A district court may order any civil action to be tried at any place within the *division* in which it is pending.

(emphasis added).

Local rules that subdivide statutory divisions, *e.g.*, E.D. MICH. R. II and W.D. MICH. R. 2, alter the meaning of the venue statutes in four ways. First, under section 1393(a), the creation of more and therefore smaller divisions restricts the area in which non-local actions against a single defendant must be brought. Second, under section 1404(a), the creation of additional divisions limits the places where actions "might have been brought," thus narrowing the court's choice of locations for transfer. Third, under section 1404(b), the subdivision of statutory divisions adds a requirement that all parties agree to a transfer which, under the larger statutory divisions alone, would otherwise have been an unconditional right. Fourth, under section 1404(c), the creation of smaller divisions limits a court's choice of places at which a pending action may be tried.

Local rules that create divisions in districts undivided by statute, *e.g.*, E.D.N.C. R. 2B, M.D.N.C. R. 3(b), E.D. VA. R. 3(B), N.D. FLA. R. 2; M.D. FLA. R. 1.02(b), D. ARIZ. R. 1, N.D. CAL. R. 105, E.D. CAL. R. 6, D. MONT. R. 2, D. NEV. R. 1, and E.D. WASH. R. 16(c), alter the meaning of the civil venue statutes in three ways. First, legislatively undivided districts are brought within the ambit of section 1393(a). Second, under section 1404(a), district courts must find that three criteria are met before making a transfer that would otherwise have been left solely to their discretion. Third, undivided districts are unnecessarily brought within the coverage of section 1404(b).

The only line of cases in which local rule divisions are discussed as they relate to civil venue statutes deal with District of Montana Rules 2 and 4. In Standish v. Gold Creek Mining Co., 92 F.2d 662 (9th Cir. 1937), *cert. denied*, 302 U.S. 765 (1938), the district court held that it did not have in personam jurisdiction over a defendant who resided in another locally-created division. On appeal, this ruling was reversed. The court of appeals, divining a congressional intent that the District of Montana have no divisions, disregarded the local rule division because it improperly restricted the court's in personam jurisdiction. In a later case, McNeil Constr. Co. v. Livingston State Bank, 155 F. Supp. 658 (D. Mont. 1957), the same local rule divisions were held to be "divisions" within the meaning of 28 U.S.C. § 1404(a), and a transfer of the case from one local division to another was allowed. *Livingston* has been read as limiting the *Standish* view of local rule divisions to cases where the court's jurisdiction, not venue, is restricted. *See* Tassie v. Continental Oil Co., 228 F. Supp. 807 (D. Mont. 1964); *Local Rules Survey, supra* note 12, at 1023.

Venue in criminal cases is determined by Federal Rule of Criminal Procedure 18,

geographical coverage. There are extreme differences in the level of service the federal courts provide in various parts of the country,[258] and creating new divisions has done little to mitigate these effects. If a court, or the organized bar in a district, wishes to make the judiciary more accessible in portions of that district, the more promising course is to lobby in Congress for new statutorily designated places where court may be held if necessary, and such resources as a building and—

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which reflects the sixth amendment's requirement that criminal defendants be tried by an impartial jury of the district in which the offense was committed. Rule 18 provides that "[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses." After rule 18 was amended in 1966 to delete a provision that restricted venue to the division in which the offense was committed, statutory and local rule divisions no longer constituted units of venue in criminal cases. Bostick v. United States, 400 F.2d 449, 452 (5th Cir. 1968), *cert. denied*, 393 U.S. 1068 (1969). Thus, the transfer of a case from one division to another does not constitute a change of venue. *See* United States v. Clark, 416 F.2d 63, 64 (9th Cir. 1969). Since the constitutional protections that accompany venue rights no longer apply to interdivision transfers, the courts possess wide discretion in making such transfers. United States v. Partin, 320 F. Supp. 275, 278 (E.D. La. 1970); Houston v. United States, 419 F.2d 30, 33 (5th Cir. 1969). *See* United States v. James, 528 F.2d 999, 1021 (5th Cir. 1976) (sua sponte interdivision transfer upheld); United States v. Lewis, 504 F.2d 92, 98-99 (6th Cir. 1974) (transfer of federal prosecution for retrial after hung jury did not violate statute prohibiting new creation of divisions).

Despite the ostensibly small role that district divisions are to play in the area of criminal venue, local rule divisions indirectly impinge upon the meaning of rule 18. Some local rules, *e.g.*, N.D. FLA. R. 2(C), M.D. FLA. R. 1.02(e), D. ARIZ. R. 1, N.D. CAL. R. 105-2(b), E.D. VA. R. 3 & 4, and E.D. WASH. R. 16(c), contain provisions that allow interdivision transfer for good cause, at the court's discretion. Another, D. MONT. R. 2, explicitly incorporates the dictates of rule 18. While these rules arguably complement rule 18, others, *e.g.*, E.D. CAL. R. 6; E.D. MICH. R. II, W.D. MICH. R. 2, D. NEV. R. 1, E.D.N.C. R. 2B, and M.D.N.C. R. 3, which rigidly specify the divisions where civil and criminal cases *are to be* tried, defy the policy of flexibility evidenced by the 1966 amendment of rule 18. Similarly, Middle District of Tennessee Rule 5, that incorporates the divisions for that district set forth in 28 U.S.C. § 123(b), requires that *all* criminal cases be tried in the Nashville division, an egregious departure from rule 18.

It is likely also that local rule divisions complicate the interpretation of 18 U.S.C. § 3240, which provides in relevant part:

> Whenever any new district *or division* is established . . . prosecutions for offenses committed within such district [or] *division* . . . *shall be commenced and proceeded with the same as if such new district or division* had not been created . . . unless the court, upon the application of the defendant, shall order the case to be removed to the new district *or division* for trial.

(emphasis added). The obvious question is whether the establishment of new divisions by local rule activates 18 U.S.C. § 3240. If local rule divisions are "divisions" within the meaning of section 3240, then defendants have a right, conditioned on the court's discretion, to have their cases removed to newly-created local rule divisions, a result that Congress surely did not contemplate.

258. *See* CASE MANAGEMENT, *supra* note 30, at 10-13, 96-98.

most significant—one or more resident judges and support staff.[259]

Another questionable body of local rules is that which creates new burdens. There are many specifications establishing the format of various documents or requiring that a form be used that is not otherwise required either by rule or by any national body.[260] The existence of these requirements is irritating to commentators and probably to foreign lawyers. Yet provisions of this kind serve obvious purposes of the court. If papers for a given purpose are always similar in size and format, the work of the court and staff can be expedited. Court rules that specify the format of documents to be filed are a routine part of the landscape for any litigating lawyer.[261] Most lawyers seem to strongly dislike conflicting requirements and would prefer a single set of requirements, but do not object to requirements per se.[262] Presumably, however, a chief purpose of the federal rules was to do away with detailed and precise pleadings and other requirements.[263]

As an aspect of the management function, local rules can be a powerful tool for rationalizing diverse court practices and imposing uniformity. A local rule that defines a single method and approach, and is implemented as written, performs a great service to lawyers. The greatest difficulty for the practitioner arises when no effective rule exists. In 1977 the Federal Court Committee of the Bar Association of

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259. Without a resident judge, facilities, and support staff, local "boosters" may well find that no court sessions are held in the city desired. Under 28 U.S.C. § 140, a court may adjourn any session "for insufficient business or other good cause." Many statutorily established places have not held regular sessions for years.

Changes are frequent in the geographical coverage defined in 28 U.S.C. §§ 81-131. For example, statutory divisions were recently eliminated in the district courts of the Western District of Louisiana, (Federal District Court Organization Act of 1978, Pub. L. No. 95-408, § 3, 92 Stat. 883 (amending 28 U.S.C. § 98(c) (1976))), and Maine (Judicial Districts, Pub. L. No. 95-573, § 2, 92 Stat. 2458 (1978) (amending 28 U.S.C. § 99 (1978))). The districts in Illinois were reorganized and renamed (Federal District Court Organization Act of 1978, Pub. L. No. 95-408, § 4(b), 92 Stat. 884 (amending 28 U.S.C. § 93 (1976))), and the divisions in North Dakota were reorganized (Federal District Court Organization Act of 1978, Pub. L. No. 95-408, § 3(b), 92 Stat. 883 (amending 28 U.S.C. § 114 (1976))). Numerous minor adjustments were made in district boundaries and places for holding court in New York. *See, e.g.*, Pub. L. No. 95-271, 92 Stat. 221 (1978) (amending 28 U.S.C. § 112(c) (1976)); Pub. L. No. 95-408, § 4(c), 92 Stat. 885 (1978) (amending 28 U.S.C. § 112 (1976)); Pub. L. No. 95-573, § 3, 92 Stat. 2458 (1978) (amending 28 U.S.C. § 112(b) (1976)).

260. For example, see Northern District of California Rule 200-3 to -9; 230-1 to -3. The fact that these rules resulted from a revision in which new rules were proposed by a bar committee suggests no great objection to them by lawyers.

261. *See, e.g.*, SUP. CT. R. 15 & 39.

262. Conferences of the author with lawyers in ten districts surveyed, *see* note 30, *supra*, produced fairly uniform reactions on this point, as did the Ninth Circuit survey. *See* note 5, *supra*.

263. 4 WRIGHT & MILLER, *supra* note 12, at § 1041; 5 *id.* at §§ 1181-1182, 1202.

Greater Cleveland assembled materials on the pretrial procedures of the judges in the Northern District of Ohio, with the intention of publishing a compilation that would guide lawyers through the various procedures of each judge at each stage. Unfortunately, the report never got beyond the stage of a rather confusing draft. The committee felt that procedures were too fluid and individual for any compilation to be both useful and current.[264] Situations such as the above dramatically demonstrate the need for the court to agree upon a single approach and sequence of forms, and to publish them.[265]

3. Improving national rules

Local rules have a great potential for informing the national rulemaking process. This potential has remained largely untapped.[266] The failures of local rules can sometimes be useful indicators that modification is needed in a national rule. The experience gained with attempts to control class action communications and rules on pretrial procedures are prime examples. Without local rules there would be even less documentation of experience than is now available. In the cases in which a local rule has been attacked, the rule has provided a visible and definite target for the appeals court to examine in light of the facts at hand.[267] Particularly in pretrial matters, but in other matters of procedure as well, the absence of a record of policies effectuated by the trial court can entirely forestall supervision by the appellate court.[268]

The work of Professor Cohn on discovery exemplifies an approach that could be widely used. He surveyed rules and procedures outlining

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264. Personal conversation with Thomas Brady, Executive Director of the Bar Association of Greater Cleveland (June 14, 1979).

265. *See Conference on Rule Making*, *supra* note 5, at 501 (observations of Judge Walter E. Hoffman); *id.* at 481 (observations of Judge Charles W. Joiner). *See also* Cohn, *supra* note 12.

266. Professor Arthur R. Miller, the Reporter to the Advisory Committee on Civil Rules, has repeatedly expressed interest in using the local rules experience for this purpose in personal conversations with the author, 1979-80. The Supreme Court's decision in Miner v. Atlass, 363 U.S. 641, 651, 663 (1960), was criticized for restricting this fund of experience. *See* Comment, *Admiralty-Depositions—District Court not Authorized to Make Local Rules Permitting Depositions for Discovery*, 36 N.Y.U. L. REV. 228, 233 (1961). *See also* note 35 *supra*.

267. *Compare* United States v. Viserto, 596 F.2d 531 (2d Cir. 1979) (because there was no local rule, court relied on speculation and hearsay regarding the practice questioned) *with* McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (language of local rule established practice in question).

268. As previously noted, appellate review of local rules is difficult and sporadic at best. *See* note 22 *supra*.

the judiciary's efforts regarding discovery rules and draws lessons for the national rules.[269] Along similar lines, the authors of the Columbia Note on local rules, although highly critical of these rules, used local rule experience to identify several problems in the federal rules.[270]

4. National policy

Local rules have been used to implement national policy. There are numerous local rules that define the powers of magistrates in a district's implementation of the several Magistrate Acts.[271] Most of the rules developed from a series of communications from the Committee on Administration of the Federal Magistrate System, Judicial Conference of the United States. For example, after the 1976 revisions to the Act[272] the committee directed its staff, the Magistrate Division of the Administrative Office of the United States Courts, to prepare alternative materials for the courts' use. In March, 1977, the Division sent out two sets of proposed rules to each district, a "long form" and an alternative "short form," and a "jurisdictional checklist" interpreting the relevant law. Several courts have since incorporated these proposals into their rules.

We have already seen that other local rules are based on national models, especially those dealing with the fair trial/free press issue.[273] Some other national models that have been or may be used in local rules are Federal Judicial Center guidelines on prisoner civil rights cases,[274] the current discussion of proposals for a national system setting qualifications for admission to federal court bars,[275] Model Federal Rules of Disciplinary Enforcement,[276] a model rule for Petition for Disclosure of Presentence or Probation Records,[277] and the several statutory requirements for district court "plans."[278]

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269. *See* Cohn, *supra* note 12. Surveying procedures outside the rules was difficult and unavoidably incomplete. Professor Cohn relied on a limited survey of individual judges conducted by the Federal Judicial Center.

270. Columbia Note, *supra* note 3, at 1271.

271. 28 U.S.C. §§ 631-639 (1976).

272. Act of Oct. 21, 1976, Pub. L. 94-577, 90 Stat. 2729 (1976) (amending 28 U.S.C. § 636(b)).

273. *See* text accompanying notes 176-89 *supra*.

274. RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (Federal Judicial Center 1977).

275. *See* Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States (Sept. 19-20, 1979).

276. ABA Standing Committee on Professional Discipline (Feb. 14, 1978).

277. May 15, 1979.

278. Requirements for district court plans appear in Jury Selection and Service Act, 28

Statutory plan requirements represent a form of double delegation. In each statute involved, Congress required the district to establish a plan subject to approval by the circuit judicial council. Several judicial councils have developed model plans that have served as the basis for district court plans. Neil Kerwin has shown that the statutory plan device can be a highly effective way to implement new national policies.[279] Most of the widely-used local rules discussed throughout this article do not represent any national policy. They go through an entirely informal and voluntary process of diffusion through the judiciary, from judge to judge and from court to court. In a decentralized system involving much judicial discretion, there is obvious appeal for an intermediate device, such as a national proposal of a local rule that will respond to a widespread problem. But the danger of this approach is obvious, because it could be used to circumvent the national rulemaking process, especially the congressional role. Beyond the clear impropriety of bypassing the one democratic element of a largely undemocratic system, it seems nearly as clear that multiplication of local rules is undesirable when a uniform national policy is available.

A national proposal for a local rule should be made only when the national body can show specific aspects of local practice that are so diverse that a national policy is impractical or undesirable. Alternatively, sometimes a national proposal of alternative local rules might be sensible for matters on which a national body is divided. However, it seems clearly undesirable to perpetuate disagreements within or among national bodies in the form of conflicting local rules, so the device should be limited to closely related alternatives that are well within the existing bounds of judicial discretion.

5. An approach

Is the present broad scope of local rules consistent with the power to make local rules? Local rules are now used not only as specifically required by statute or rule but also as a "notice board" for routine information, a tool of court and docket management, a channel of information about court views on matters where it must exercise broad discretion, an occasional device for filling gaps in the national rules, and an occasional vehicle for implementing national policies. The rules have also provided opportunities for courts to hammer out inter-

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U.S.C. § 1863 (1976); Criminal Justice Act, 18 U.S.C. § 3006A (1976); Speedy Trial Act, 18 U.S.C. §§ 3165-3166 (1976).

279. Kerwin, *Judicial Implementation of Public Policy: The Courts and Legislation for the Judiciary*, 16 HARV. J. LEG. 415 (1979).

nal agreement on common policies, and they are a valuable potential resource for national rulemakers.

All of these are useful and important purposes, yet the resulting body of rules is certainly prolix and disorganized, aptly characterized as "the soft underbelly of federal procedure."[280] Much can be done to rationalize the body of rules within their present scope. On the prior question, there is little authority for the proposition that the present scope of local rules is too broad.[281] It is not clear whether the framers of rule 83 intended for the local rules to exclude the purposes just outlined above. Certainly they hoped to abolish conformity. Certainly they also intended to abolish existing local rules that were in conflict with the new rules they had developed. As one would expect, many districts carried forward massive bodies of local rules from the conformity era that made frequent reference to obsolete forms of action.[282] When the Knox Committee looked at the rules of each district, its "examination developed the expected conclusion that numerous local rules in effect when the Federal Rules of Civil Procedure became operative, were in conflict with the provisions of those rules. . . . The continued existence of those obsolete [local] rules without recession or revision has caused some uncertainty . . . ."[283] It is in this context that we should understand the Knox Committee's view that Federal Rules of Civil Procedure were "so comprehensive as to leave very few subjects that need now be dealt with at all by local rules."[284] The Committee had a specific purpose that it successfully discharged. Given the occasional statements of the authors of the Federal Rules of Civil Procedure suggesting remaining significant purposes for local rules,[285] we need

280. Letter from Charles A. Wright to the Duke Law Journal (Nov. 16, 1965), *quoted in Local Rules Survey, supra* note 12, at 1012 n.6 and 12 WRIGHT & MILLER, *supra* note 12, at 218.

281. Except, of course, the many commentaries of the last fifteen years cited throughout this article that have looked at local rules with a jaundiced eye.

282. On September 15, 1938, the District Court of Oregon simply reissued its former rules, with a notation that any that might be inconsistent with the Federal Rules of Civil Procedure were of no effect. The old rules had been adopted March 1, 1913, with amendments in 1936 and 1937. The Southern District Court of New York, on the other hand, appointed a bar committee that rewrote the local rules. Pre-1938 local rules were often voluminous and full of references to state procedure and to demurrers and other pleadings that the Federal Rules of Civil Procedure have eliminated.

283. Knox Report, *supra* note 167, at 10.

284. *Id.* at 9.

285. Dean Charles Clark said, for example: "But one of the problems to be faced is the wide diversity of conditions existing in different parts of the country and rules must be adjusted to accommodate themselves to that diversity." Clark, *A Striking Feature of the Proposed New Rules, Change in Basic Attitude Towards Improved Procedure*, 22 A.B.A.J. 787,

not attach a larger significance to the work of this successor committee. We can, rather, respond in two ways: by recognizing that local rules could be expected to proliferate in the increasingly complex litigative environment since 1940, and by searching for ways to simplify and order local rules without restricting their present use in support of the important purposes just outlined.

V. An Agenda

The agenda of the local rules critics is fairly straightforward, and follows clearly from their finding that the courts have usurped a quasi-legislative power never assigned to them. The corresponding remedy must be to restrict that power, control its exercise through external supervision, and reform rulemaking procedures. The agenda to draw here must be more complex and less focused, because my main conclusion thus far is that the criticisms are wrong. What follows is incomplete. Some policy conclusions seem clear, but many questions remain unresolved.

The Knox Committee suggested removing "unimportant minutiae" from local rules.[286] Clearly enough, purely internal matters that no practitioner needs to know should be excised entirely. A more difficult question concerns what should be done with provisions that are "notice board" matters. Surely not everything that is worth publicly establishing as a matter of policy is worth enforcing as a rule.[287] A threshold problem for reform efforts is the desirability of placing purely informational matters in a separate forum. The common model in district courts is to use "General Orders" for this purpose, a practice fairly widespread in the Ninth Circuit and recommended by the Knox Re-

789 (1936). Clark went on to oppose suggestions that local practice be incorporated into the rules, so he left open considerable scope for local variation.

Major Tolman expected that the first sentence of rule 83 (the local rule provision) would be sparingly used: "There should be very few instances where rules of this character are needed, since the general rules cover the ground pretty thoroughly." However, his corresponding reference to the final sentence ("one of the most important and salutary in the entire set of rules") is extremely limiting: "It [the last sentence] permits judges to decide the unusual or minor procedural problems . . . ." ABA Institute (Wash. D.C.), *supra* note 4. It appears we must surprise Major Tolman by expanding the scope of either the first sentence or the final one. To have important matters involving judicial discretion undefined and left to be adjudicated under the final sentence, is at least as inconsistent with his analysis of the rule as is the expansion of local rules the Columbia Note authors criticized. *See also* notes 170 & 171 *supra*.

286. Knox Report, *supra* note 167, at 12.

287. Local rules have the force of law. *See* 12 Wright & Miller, *supra* note 12, at 223-24.

port.[288] Arguably, a distinction that isolates informational matters might improve local rules practice. Local rules could be shortened and their purposes made clearer. The quasi-legislative cast now given to purely descriptive provisions could be abandoned and reserved to matters such as class action communications that deserve a more full and considered treatment before a local rule is adopted. Perhaps most important, it would be easier for a court to insist that the remaining local rules be uniformly enforced and followed.

But who is to define the distinction between local rule material and "General Order" material? Both deal exclusively with procedure, so no guide can be found in distinctions between substance and procedure in other contexts. Perhaps it is necessary to distinguish "substantive procedure" suitable for local rules from "procedural procedure" appropriate for the notice board. Even if such a distinction could be made in principle, its implementation in ninety-five districts probably would not be consistent and lawyers would confront the problematic task of searching two sets of materials for a court's policy on any point not clearly assignable to one or the other.

Finally, how would the "notice board" materials be collected and distributed? The "General Orders" of the Central District of California are collected in two large loose-leaf volumes in the Clerk's Office and, one must assume, in the offices of law firms in Los Angeles and a few other places. There is no national collection. A better solution would be to follow the lead of the Third and Ninth Circuit Courts of Appeals and publish "Internal Operating Procedures" covering all informational matters, but even this might lead to confusion. In the final analysis, the bar will be best served if all courtwide procedures announced in a form intended for circulation among lawyers are called local rules and are printed together. While this procedure creates confusion by treating different provisions similarly, there may be no less effective alternative.

Assuming that a single and heterogeneous body of local rules is to be compiled, how and how much should they be reformed? Consider the following suggestions:

1. *A court's review of its local rules should be continuous and aggressive*. Apart from new policy initiatives a court may consider, a court should assure that someone, *i.e.* the clerk, a bar committee, or a bench committee, has a continuing responsibility to keep the local rules current, assure that the rules are lawful, and that they reflect an ade-

288. Knox Report, *supra* note 167, at 20.

quate technical level of draftsmanship. Obsolete provisions and confusing, unlawful, or misleading provisions must be eliminated.

2. *Courts should make maximum use of local rules for management and informational purposes*. There should be a local rule on every procedural matter lawyers need to know about on which a common policy exists.[289] Where judges' policies conflict, a court should try to develop a common policy that can be embodied in a rule. Where a rule is or becomes ineffective, it should be made effective or withdrawn.

3. *Courts should involve the bar and sometimes the public in rulemaking*. Bar committees can clearly be useful in identifying flaws in existing rules and unanticipated burdens or difficulties in proposed rules. These committees can aid in criticizing and helping to modify underlying court policies that affect lawyers and clients. While consultation should be maximized, a formal notice and comment procedure may not be necessary for every rule change. Procedures providing notice and opportunity for comment should be published and invoked whenever a major rule is considered or a wholesale revision is undertaken.[290] Individual lawyers should be specifically asked to contribute detailed analysis and criticism.

4. *Courts should be especially meticulous in avoiding local rules that reverse an existing burden or presumption*. Several questionable local rules, that otherwise only define a court's usual practice, are suspect on this ground. Specifically, these rules deal with subjects such as numerical limits on interrogatories and requirements for payment for distant depositions. A court that expands its local rules could easily create new rules with this fault and, therefore, should be aware of the danger.

5. *The judiciary, at every level, should try to achieve maximum uniformity consistent with the informational function of national and local rules*. Circuit-wide local rules, as proposed, for example, in the Ninth Circuit, are certainly desirable if adequate agreement can be obtained by all adopting courts *and* it is clear that the matters in question cannot or will not be adopted nationally. A nationwide uniform numbering system would simplify the task of finding relevant provisions.

6. *The national rules advisory committees should review local rules*

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289. Carrying this notion a step further, assuming a presumption against expanding the national rules exists, then perhaps local rules should be as exempt from any corresponding presumption. In that case, local rules are the natural vehicle for informational matters in general, assuming that they meet the other standards defined below.

290. An authoritative recommendation to this effect was recently made to the courts of appeals. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 44-46 (June, 1975).

in a continuous effort to memorialize as national policy, the policies of individual courts that enjoy general acceptance. It seems clear that a vigorous national effort to define and remove from local rules each significant new consensus on procedure will greatly aid the effort to rationalize rules and policies at every level.

Rule 83 should be considered for amendment to encourage or require courts to enforce court-wide application of local rules, and to encourage broad consultation before a rule is promulgated or amended. Rule 83 sets up the rulemaking process that makes a district court very much like a legislature. A current majority can pass a rule that is binding both on the minority who oppose it and on all future appointees. This provision imposes a management burden on a district court that is more apparent than its counterpart in a legislature, whose members are not directly affected by most of their own laws. The district courts have not been effective in assuring that all judges comply with their local rules.[291] On the question of consultation, it seems clear that present procedures are not widely recognized and may not always be adequate. An amendment might help to clear the air.[292]

8. *Uses of local rules for national policy should be systematized and their purposes distinguished from national rulemaking.* Local rules should never be used to avoid scrutiny of rules by Congress. When a national body wishes to use limited experience with a procedure to inform its deliberations, it should determine in advance the information sought.[293]

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291. Perhaps it would help to amend Federal Rule of Civil Procedure 83 by adding a comma at the end of the first sentence, and continuing "provided the court is satisfied that all judges will enforce and abide by the rules as made or amended by a majority." Alternatively, an amendment might require more than a majority for making or amending local rules. A final possibility would be to include language in rule 83 to make explicit a present and future responsibility of each district court to monitor compliance and take action if compliance is not obtained.

292. A new second sentence might be inserted into Federal Rule of Civil Procedure 83 as follows: "Promulgation shall follow appropriate notice and consultation with the bar and other interested groups."

293. Possible new langage to add at the end of Federal Rule of Civil Procedure 83:

> From time to time the Judicial Conference of the United States may propose local rules for possible adoption by district courts. If it wishes to consider the possibility of future amendments to the Federal Rules of Civil Procedure through a version of the proposed local rule, it shall specify the information desired to be obtained and the fashion in which that information will bear on adoption or non-adoption of the amendment to the federal rules.
>
> The Judicial Conference shall not propose local rules in the expectation of universal adoption.

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VI. Some Unresolved Questions

While this agenda may propose a good deal of new activity, it forecloses little and leaves some questions open. Where is the best boundary between national and local rules? One answer might be that the national rules should incorporate *all* procedural matters on which national agreement can be obtained. This extreme measure might greatly expand the national rules, violating the principles of "simplicity, scarcity and economy" that have served well.[294] The rules might eventually include precise specification of paper size, format, and sequence of topics in various pleadings, for example. Or should the rules be rigorously limited to their original topics?[295] This would likely be a prescription for steadily expanding differences among districts. A suitable middle ground is elusive.

Another open question is the possibility of a review body for local rules. This body might include the existing advisory committees on rules, the circuit Judicial Councils, or the Federal Judicial Center.[296] The drawbacks are clear in each case; yet pressure for review could necessitate some new formal mechanisms. If the courts do not reform their own rules, as suggested above, some form of review will become increasingly desirable.

Finally, there are interesting unresolved questions on the present and prospective use of local rules to illuminate proposals for national rules. Do experiments along these lines raise equal protection problems?[297] How can the local rules experience be brought to bear on national proposals in something better than an *ad hoc* fashion? These and other questions will hopefully be determined through expanded experimentation with the local rules process.

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294. Columbia Note, *supra* note 3, at 1252, *quoted in* 12 Wright & Miller, *supra* note 12, at 217.

295. This approach would be inconsistent with the expectation of the Federal Rule of Civil Procedure authors. *See* Knox Report, *supra* note 167, at 13 & n.5.

296. We have the views of the original advisory committee on the possibility of review by the courts of appeals only.

> There was a discussion in the Committee as to whether the local rules in each district should be made as a finality by the district judges or whether they should be subject to approval by the circuit court of appeals of the respective circuits. The Committee entertained the view that as the district judges are the ones to operate under the local rules they should have the final determination subject to modification by the Supreme Court of the United States if that court desires to change any local rule so prescribed.

ABA Institute (Cleveland), *supra* note 4, at 357 (statement of Hon. George Donworth).

297. These issues are the subject of current work by the Federal Judicial Center's Advisory Committee on Experimentation in the Law.

APPENDIX A

Divisions Created by Statute and Local Rule

	Statutory Divisions		Local Rule Divisions			Statutory Divisions		Local Rule Divisions	
	28 U.S.C. §	#	Local Rule	#		28 U.S.C. §	#	Local Rule	#
First Circuit								(But combines divisions in criminal cases).	
Me.	99	2							
Mass.	101	1			W.D. Tenn.	123(c)	2		
N.H.	109	1			**Seventh Circuit**				
R.I.	120	1			N.D. Ill.	93(a)	2		
P.R.	119	1			S.D. Ill.	93(b)	2		
Second Circuit					E.D. Ill.	93(c)	1		
Conn.	86	1			N.D. Ind.	94(a)	3		
N.D.N.Y.	112(a)	1			S.D. Ind.	94(b)	4		
E.D.N.Y.	112(c)	1			E.D. Wis.	130(a)	1		
S.D.N.Y.	112(b)	1			W.D. Wis.	130(b)	1		
W.D.N.Y.	112(d)	1			**Eighth Circuit**				
Vt.	126	1			E.D. Ark.	83(a)	5		
Third Circuit					W.D. Ark.	83(b)	6		
Del.	87	1			N.D. Iowa	95(a)	4		
N.J.	110	1			S.D. Iowa	95(b)	6		
E.D. Pa.	118(a)	1			Minn.	103	6		
M.D. Pa.	118(b)	1			E.D. Mo.	105(a)	3		
W.D. Pa.	118(c)	1			W.D. Mo.	105(b)	5		
V.I.	48 U.S.C. § 1615	2			Neb.	107	1		
					N.D.	114	4		
Fourth Circuit					S.D.	122	4		
Md.	100				**Ninth Circuit**				
E.D.N.C.	113(a)	1	Rule 28	7	Alaska	81A	1		
M.D.N.C.	113(b)	1	Rule 3(b)	6	Ariz.	82	1	Rule 1 ("[T]he district is divided into four *unofficial* divisions.") (emphasis added).	4
W.D.N.C.	113(c)	1							
S.C.	121	10			N.D. Cal.	84(a)	1	Rule 105	2
E.D. Va.	127(a)	1			E.D. Cal.	84(b)	1	Rule 6	2
W.D. Va.	127(b)	1			C.D. Cal.	84(c)	1		
N.D.W. Va.	129(a)	1			S.D. Cal.	84(d)	1		
S.D.W. Va.	129(b)	1			Hawaii	91	1		
Fifth Circuit					Idaho	92	1		
N.D. Ala.	81(a)	7			Mont.	106	1	Rules 2 & 4	5
M.D. Ala.	81(b)	3			Nev.	108	1	Rule 1 ("For convenience, the district is divided into two *unofficial* districts.") (emphasis added).	2
S.D. Ala.	81(c)	2							
N.D. Fla.	89(a)	1	Rule 2	4					
M.D. Fla.	89(b)	1	Rule 1.02b	5					
S.D. Fla.	89(c)	1							
N.D. Ga.	90(a)	4							
M.D. Ga.	90(b)	7							
S.D. Ga.	90(c)	6							
E.D. La.	98(a)	1			Or.	117	1		
M.D. La.	98(b)	1			E.D. Wash.	123(a)	1	Rule 16c	3
W.D. La.	98(c)	6			W.D. Wash.	128(b)	1		
N.D. Miss.	104(a)	4			Guam	48 U.S.C. § 1424	1		
S.D. Miss.	104(b)	5			N. Mariana Is.	48 U.S.C. § 1694(a)	1		
N.D. Tex.	124(a)	7			**Tenth Circuit**				
E.D. Tex.	124(c)	6			Colo.	85	1		
S.D. Tex.	124(b)	6			Kan.	96	1		
W.D. Tex.	124(d)	7			N.M.	111	1		
C.Z.	48 S.A.L. § 1122	1			N.D. Okla.	116(a)	1		
					E.D. Okla.	116(b)	1		
Sixth Circuit					W.D. Okla.	116(c)	1		
E.D. Ky.	97(a)	1			Utah	125	2		
W.D. Ky.	97(b)	1			Wyo.	131	1		
E.D. Mich.	102(a)	2	Rule 11	3	**District of Columbia Circuit**				
W.D. Mich.	102(b)	2	Rule 2		D.C.	88	1		
N.D. Ohio	115(a)	2				Totals	224		
S.D. Ohio	115(b)	2				Total Divisions			285
E.D. Tenn.	123(a)	4							
M.D. Tenn.	123(b)	3	Rule 5	3					

APPENDIX B

Ninth Circuit Proposed Uniform Local Rules*

I. Organization and Operation of the Court
- 1-105 Sessions
- 1-110 Office of the Clerk
- 1-120 Assignment and Transfer of Cases
- 1-125 Court Fees
- 1-130 Files and Records: Exhibits
- 1-135 Orders Grantable by Clerk
- 1-140 Official Newspapers
- 1-145 Conduct in Courtroom: Photography and Recording Devices
- 1-150 Court Library
- 1-155 Sanctions
- 1-160 Procedure for Adopting, Rescinding, and Amending Rules
- 1-165 Transitional Provision; Effective Date
- 1-170 Short Title

II. Attorneys
- 2-105 Attorneys—Appearance and Withdrawal
- 2-110 Attorneys—Admission to Practice
- 2-115 Standards of Professional Responsibility
- 2-120 Model Federal Rules of Disciplinary Enforcement (Alternative 1)
- 2-120 Alternative 2
- 2-125 "Free Press—Fair Trial"

III. Civil Rules

A. Form of Papers Filed; Related Cases; Stipulations
- 3-105 Format of Papers
- 3-110 Notice of Related Cases
- 3-115 Stipulations

B. Proceedings Before Trial
- 3-205 Service of Process
- 3-210 Scheduling Conference
- 3-215 Motions
- 3-220 Motions Dealing with Depositions and Discovery
- 3-225 Interrogatories to Parties
- 3-230 Requests for Productions
- 3-235 Requests for Admission

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* This table is drawn from a preliminary report submitted by Profs. Edward W. Cleary and Robert L. Misner (Arizona State University, Mar. 2, 1979) to the circuit-wide committee of the circuit judicial conference.

3-240 Notice of Settlement or Other Disposition
3-245 Dismissal for Failure to Prosecute
3-250 Minors and Incompetents
3-255 Security for Costs
3-260 Surety Bonds
3-265 Removal Bond

C. Trial

3-305 Size of Civil Juries
3-310 Jurors—Examination
3-315 Jurors—Exercise of Peremptory Challenges
3-320 Instructions to Juries—Requests and Objections
3-325 Verdicts: Special Verdicts and Interrogatories to Juries
3-330 Proposed Findings of Fact and Conclusions of Law

D. Judgments and Proceedings After Trial

3-405 Judgments: Preparation and Objections
3-410 Motions for New Trial and Motion Judgment Notwithstanding the Verdict
3-415 Taxation of Costs

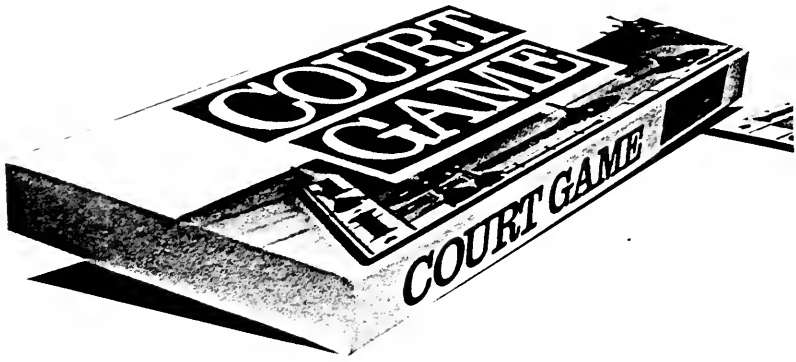
E. Special Proceedings and Ancilliary Remedies

3-505 Habeas Corpus and § 2255 Motions
3-510 Receivers Other Than in Bankruptcy
3-515 Naturalization
3-520 Social Security and Black Lung Actions

In praise of local rules

Local rules rarely conflict with federal ones, a researcher argues, and they tell attorneys what to do in unfamiliar situations.

by Steven Flanders



The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.
—28 USC 2071

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.
—Rule 83, Federal Rules of Civil Procedure

Local rules may not be popular among scholars, but they are rarely criticized by those who practice in the federal courts. In treatises and law reviews, commentators have attacked almost every aspect of the power of district courts to promulgate local rules, but judges and lawyers often seem surprised to learn of this chorus of criticism. They consider local rules part of the landscape of federal practice, where a rule or two may need change but not the whole process of rulemaking.

In my opinion, the critics have gone far afield, drawing comprehensive conclusions from narrow and remediable abuses. It would be a mistake to suggest that the federal rules be changed to withdraw any part of this power from local courts when, for the

most part, they use it to advantage. In fact, the problems are far fewer and the advantages far greater than most critics imagine.

In this article, I will argue that local rules do not undermine uniformity of national procedure significantly; that the problems that exist are exceptional and remediable, not systemic; that many of the criticisms against local rules do not stand up under close scrutiny; and that local rules constitute a very important tool for district court administration. My views are only preliminary because I have just begun to survey local rules as part of another project and to examine all specific criticisms of such rules.[1]

Confusion in diversity

The critics argue that nothing but confusion results from the present system. "Use by the lower courts of their local rule-making power . . . is for the most part an unmitigated disaster," Professor Charles Alan Wright recently declared.[2] Rule 83 requires local rules to be consistent with federal rules, and the Supreme Court forbids their application to "basic procedural innovations."[3] But Wright contends that courts have held many local rules invalid because they conflict with federal ones.[4] Other local rules remain on the books, Wright says, though they also conflict directly with national law.[5]

Wright and his coauthor, Arthur R. Miller, rely heavily on a Note from the Columbia

1. The previous project is described in Steven Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (Washington: Federal Judicial Center, 1977).

2. Charles Alan Wright, review of Jack Weinstein, REFORM OF COURT RULE-MAKING PROCEDURES, 9 ST. MARY'S L.J. 657 (1978).

3. Miner v. Atlass, 383 U.S. 650 (1960).

4. Charles Alan Wright and Arthur R. Miller, 12 FEDERAL PRACTICE AND PROCEDURE 219. St. Paul: West, 1973.

5. *Id.*

Law Review,[6] and a Comment from Duke Law Journal,[7] which until recently were the only general treatments of local rules. The Columbia commentator argued that, in promulgating rules, many courts disregarded "the principles of simplicity, scarcity and uniformity, which guided the formulation of the federal rules."[8] Sometimes district courts used their rule-making power to negate specific requirements of the federal rules, the author of the Note said. Other times, they used their power to "escape from the arduous but essential task of case-by-case analysis."[9]

Wright and Miller consider the problem so serious that they recommend severely restricting the local courts' rulemaking power. "The great goals of a simple, flexible, and uniform procedure in federal courts throughout the nation will be seriously compromised unless an effective check is put on the power to make local rules," they write.[10] They recommend that Rule 83 be amended to define limited areas where local courts may make rules—or that the Judicial Conference (or Standing Committee on Rules of Practice and Procedure) be required to approve any new local rules.

Other critics also see this same problem of confusion so long as district courts can make extensive local rules. "The federal courts of this country are becoming a kind of procedural Tower of Babel because of the differences in local rules" says Maurice Rosenberg of Columbia University.[11] "(M)any local rules are in conflict with the policy of simplicity which underlies the federal rules," says Raymond C. Caballero of the Texas bar.[12] "Practice under the federal rules should not be so varied that one would need local counsel."

One of the best-known critics, Judge Jack B. Weinstein, thinks the problem is snowballing. "The subject matter of local rule making continues to expand as local judges exercise their fertile imaginations to deal with perceived problems."[13] He also contends that "control of the local rulemaking power has been relatively ineffective."[14] Perhaps most important, he feels the courts have been irresponsible in promulgating local rules.

> Lack of public debate and publication of local rules before adoption is typical. . . . Mere publication is probably not enough. Members of the bar will generally not respond unless committees of the bar associations have studied the matters or the court itself appoints a committee or reaches out to invite persons who should be interested to attend a public hearing. . . . Nevertheless, the effort to involve the bar is wothwhile. In addition to valuable suggestions and prevention of inadvertent mistakes, a major advantage of involving the bar is that lawyers are more likely to accept the changes.
>
> Private adoption without an opportunity to those affected to be heard is undesirable. No rule by a regulatory agency adopted after such a procedure could be permitted to stand.[15]

How much uniformity?

The sheer volume of federal rules and the number of issues they address is one of the commonest objections to local rules. However, the law requires each of the 95 federal courts to promulgate a local rule on several points, and on many matters nearly everyone agrees that local rules are needed and acceptable (bar admission, for example). Those facts alone assure one or two thousand rules altogether.

Courts also promulgate other rules in response to specific local problems. The Northern District of Alabama has established a rule regulating the procedure for removing files from the clerks office. How better would a district court deal with a problem like that than by promulgating a local rule? The court needs a policy, it needs

6. Note, *Rule 83 and the Local Federal Rules*, 67 COLUMBIA L. REV. 1251-1276 (1967).

7. Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011-1112.

8. Columbia Note, *supra* n. 6, at 1252. Quoted in Wright and Miller, *supra* n. 4, at 217.

9. *Id.*

10. Wright and Miller, *supra* n. 4, at 223.

11. *Hearings on S. 915 and H.R. 6111 before the Senate Subcommittee on Improvements in Judicial Machinery* (bills to establish a Federal Judicial Center), 90th Cong., 1st Sess. 282 (1967).

12. Raymond L. Caballero, *Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?* 24 FEDERAL BAR NEWS 325 (December 1977).

13. Jack B. Weinstein, REFORM OF COURT RULE-MAKING PROCEDURES 120. Columbus: Ohio State U. Press, 1977.

14. *Id.*

15. *Id.*, at 129-130.

to publicize the policy and it needs to make the policy easy to find. A local rule is the answer.[16]

Much of the hostility to local rules comes from misplaced ideology to the effect that national uniformity is what the federal rules are really all about. Of course, this ideology has excellent historical roots: Charles Clark, who drafted much of the body of federal rules, certainly saw his handiwork in that light in substantial degree.[17] The "institutes" held after the rules were promulgated, the Knox Report, and the history of the rules themselves all reflect this very impressive tradition.[18]

The local rules taken together represent a contrary if unarticulated tradition, but a tradition quite compatible with the "national uniformity" ideology. The local rules as a body seem appealing and essential to a defender, but messy, offensive, or worse to their critics. I see the rules as a tool judges need in the day-to-day tasks of running a magnificent national structure—the Federal Rules of Civil Procedure and the rest—which has been superimposed on an extraordinarily diverse body of local and state practices and procedures. At their best, the local rules represent an effort to accommodate local practices into this national forum, to resolve and contain local conflicts and disputes—in short, to do the job the federal courts are for.

Local rules are a useful way for the federal system to gain experience with new approaches to court problems. Before a rule is adopted nationally, the standing committees of the federal courts can consider the experience other courts have gained (assuming the new rule is consistent with other law). For example, the committees may benefit from local experience with changes that restrict admission to the trial bar. Experiments with arbitration may also help national policymakers make decisions on this issue.

But before we consider further the usefulness of local rules, it may help to try to determine whether many of them really conflict with federal rules. This criticism seems to be the heart of the opponents attack, but it is not an effective one. It requires detailed treatment because appellate review of local rules is difficult and sporadic, as Weinstein and other commentators point out.[19]

Obsolescence

Some of the conflicts result from recent amendments to the federal rules. Take, for example, the 1963 amendment to Rule 58 of the Federal Rules of Civil Procedure, which forbids a district court to direct attorneys to prepare forms of judgment as a matter of course. Many courts, such as the Central District of California, maintain rules that require that "all appealable orders and all other orders orally announced in open court in any case, shall be prepared in writing by counsel for the successful party . . ."[20] But my search has not uncovered any such rule promulgated since 1963; they all seem to be vestiges of the years before the amendment.

Of course, the fact that they are unlawful does not foreclose their being enforced, as may be common. But this situation may have no practical significance since judges are free to require preparation of a form of judgment by the prevailing party in every case separately.

Or consider the rule by which some districts have fixed the amount in which a supersedeas bond must be given to obtain a stay pending appeal. "The appellate rules deliberately say nothing on the size of the supersedeas bond because they intended that this should be fixed individually by the court in each case," according to Wright and Miller.[21] Local rules that specify bond

16. A committee in the Ninth Circuit, under Judge C.A. Muecke of Arizona is considering the possibility of a uniform numbering system for local rules. Professors Edward W. Cleary and Robert L. Misner of Arizona State University are conducting studies for the committee.

17. Charles Clark, *Federal Procedural Reform and States' Rights; To a More Perfect Union*, 40 TEXAS L. REV. 211 (1961), reprinted in Charles Alan Wright and Harry M. Reasoner, eds., PROCEDURE—THE HANDMAID OF JUSTICE 99-114. St. Paul: West, 1965.

18. The author of the Columbia Note describes these sources *supra* n. 6, at 1255-1259.

19. Weinstein, *supra* n. 13 at 121.

20. Rule 7(a), Central District of California. All local rules cited here are reproduced from *Federal Local Court Rules*, an occasional loose-leaf service published by Callaghan. Although the Federal Judicial Center has a more complete collection, I have limited references here to the service that is generally available.

21. Wright and Miller, *supra* n. 4 at 242.

amounts, like some others, refer to a passage in former civil rules 72-76 that was dropped when the Federal Rules of Appellate Procedure were promulgated in 1967.

A vestige of a more distant past is the local rule which says that procedure in state courts may govern in the absence of any controlling federal rule.[22] Such rules common before FRCP were promulgated in 1938, are contrary to an intent of Rule 83. Its last sentence was meant to abolish the old Conformity Act, which had specified that state practice would govern federal procedure. Although any reference in current law to state practice must be a bit jarring, I have found no rule stronger on this point than two that simply advise that state practice *may* be applied if no other guide exists.[23]

It is true that local rules contain obsolete provisions. These may be no worse than sloppy, but they may also be misleading where they refer to provisions that have actually been changed. The revised national rule or statute would govern, of course, if it were identified.

A solution to this problem, however, is the one that districts such as Maryland and Northern Illinois use. There the clerk of the court performs a continuous review of local rules. Every district should assign a person to make this review regularly, for reasons of policy and to keep the rules up to date.

Serious conflicts

Some of the other conflicts that commentators have discovered are not so easily resolved. Possibly the most troubling provision is the requirement in at least three U.S. district courts that leave of court be obtained by an attorney who wishes to propound more than 20 (sometimes 30) interrogatories. Wright and Miller find this rule "flatly inconsistent" and "invalid."[24] Rule 26(b) (1) lays out a broad scope for discovery, with no suggestion of this type of restriction. More specifically, the first sentence of Rule 33 ("any party may serve . . . interrogatories . . .") could hardly be more clear.

The force of these provisions is the greater because Rule 33 was more restrictive before

22. Wright and Miller, *supra* n. 4 at 244.

23. Civil Rule 15, Southern District, New York; Civil Rule 19, Northern District, Illinois.

24. Wright and Miller, *supra* n. 4 at 8: § 2168.

Letting the bar write the rules

It may be that the bar is more often involved in rule-making than the critics suppose. One official who has worked with the process nationally told me that the bar, or at least several lawyers, is nearly always involved in drafting revised local rules.

An example of lawyer involvement in writing rules occurred recently in Arkansas. There, the two federal courts turned over the job of drafting new local rules to a statewide committee of lawyers. The committee included representatives of every type of practice. No judge or other employee of either court was a member. The rules were completed last summer.

Unfortunately, the chief judge has not felt he can promulgate these rules now because of Congressional inaction on the Omnibus Judgeship Bill. If he and his colleagues promulgate them, he reasons, the situation in a year or two would be that the local rules of the two districts would have been adopted by a minority of judges then sitting.

The committee proposed 52 quite comprehensive rules. To my knowledge, there was little or no discussion of the scholarly criticisms of local rule-making, though the committee had available existing rules from nearly all districts, and used commentary on particular points. Apparently, Arkansas lawyers are not pressing for massive reform of the rule-making power.

A similar process occurred in 1973 in Iowa, where drafting of common local rules for the two districts was coordinated by a Special Committee of the Iowa State Bar Association. The process and result are described in David J. Blair, "The New Local Rules for Federal Practice in Iowa," 23 DRAKE L. REV. 517 (1974).

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an amendment of 1970. Local rules that attempt to modify it depart from a steady evolution to loosen restrictions on interrogatories, and a specific, recently articulated, national policy.

Another group of rules that critics find offensive are rules such as Rule 20 of the Western District of Texas, which forbids an attorney from interviewing jurors after they reach their verdict, unless he obtains leave of court. Raymond C. Caballero calls this rule "facially invalid," but then presents an argument based only on policy grounds, and suggests that the rule's problems may actually result from implementation.[25] But no legal argument that I can find indicates that this very common rule is invalid. As far as policy goes, the facts recited in *U.S. v. Rocks*, 399 F.Supp. 249, a case which led to adoption of an identical rule in two affected districts, seem ample justification to me.

The "clearest examples" of conflicts that Wright and Miller have found are two provisions in the local rules of the First Circuit Court of Appeals. First Circuit Rule 8 provides that a case will be docketed as soon as the record is received, "notwithstanding" Rule 12 of the Federal Rules of Appellate Procedure, which requires the court to wait until the fee has been paid. First Circuit Rule 11(c) advises lawyers that the court will not consult portions of the record not included in the appendix. But FRAP 30 says "The fact that parts of the record are not included in the appendix shall not prevent parties or the court from relying on such parts."

But apart from these problems, do any other local rules conflict with federal ones? Not to my knowledge.[26] Though some local rules may be foolish, they are hardly illegal. For example, local rules that create "divisions" of a district not provided by statute seem remarkably unwise.[27] They not only create administrative problems, but they also may restrict venue following 28 U.S.C. 1393. I can see no useful reason for doing that.[28]

It appears also that few, if any, standing orders on discovery and other matters directly conflict with federal rules, though they may create a diversity of practice within several courts (particularly the Central District of California and the Eastern District of Pennsylvania, which I have studied intensively). But diversity of practice is an entirely separate question from that of conflicts.

The value of local rules

But we need not rely upon the relative absence of conflict to demonstrate the acceptability of local rules. We can make a positive case that local rules, far from burdening the bar, represent an essential mode of communication between bench and bar.

Even the critics agree that the federal rules provide only a skeleton, and leave open wide discretion to federal trial judges. Examples of the areas in which discretion is available are control of discovery, pretrial requirements, admission to the bar of a district, and local special problems of various sorts. There are also many issues on which statute or rule require or permit a local rule.[29] District judges and courts have established consistent policies on many such matters of inarguable discretion.

Diverse practice (within the range of permissible discretion) seems inevitable in the federal judiciary. It follows from the wide discretion available, from the high degree of independence accorded federal judges, and from the fact that the practice of law (despite

25. Caballero, *supra* n. 12.

26. There are several other candidates, but all are doubtful in some respect. To me, as to Wright and Miller and many others, six-man juries by local rule are the most serious abuse extant. However, the Supreme Court ruled otherwise in Colegrove v. Battin 413 U.S. 149 (1973).

A local rule that permitted oral argument on summary judgment motions only by leave of court was overturned [Dredge v. Perry, 338 F.2nd 456 (1964)]. I know of no such rule now.

Some matters still in dispute are mandatory bonds for foreign plaintiffs, the notice required in a dismissal by local rule, rules forbidding lawyers in class actions to contact class members, and permissible pretrial requirements.

27. Rule 2 of the District of Montana for example. Rule 6 of the Eastern District of California and Rule 1 of the District of Arizona may present this problem to a lesser degree.

28. *See, e.g.*, Rule 1 of the Southern District of Florida on "Docketing and Trial," which defines the place where each case shall be docketed and tried, and papers filed. Because this rule promises no ironclad assignment to a division (only to a jury division, a different matter), no venue difficulties can result.

29. Wright and Miller, *supra* n. 4 at 217.

some nationalizing tendencies) is localized to states and counties in a degree that has few parallels in other professions or sectors of the economy. Most important, the pattern by which federal judges are recruited assures that the judges have strong local or statewide ties.

U.S. district courts hardly are field offices of any national apparatus, unlike other agencies that often share their buildings. Power in administrative matters lies in the courts themselves. Apart from obvious exceptions (especially resources), power does not flow from any Washington hierarchy. The policies and the incentives characteristic of this distribution of power generally reflect local or statewide practice to a significant degree.

Diverse practice is desirable as well.

> Because courts must respond to the environment in which they operate, they must remain flexible. Courts must be able to adjust to changes in case flow, particularly at the trial court level. The trial court is at the hub of a wheel which intersects with prosecutors' offices, private attorneys, litigants, juries, witnesses, lay groups, city and county governments. . . .[30]

A decentralized administrative structure that can respond to local needs is widely supported in recent management literature.[31]

Given diversity, it seems foolish to argue consistent policies should be somehow suppressed, rather than published. It was argued in the 1967 Columbia Note that Rule 83 confers a rulemaking power in its first sentence which is distinct from the "decisionmaking power" contained in its final sentence.[32] This distinction has been influential: it has been adopted in large part by most critics of the local rulemaking power, who assert that there is too much rulemaking, leaving too little to be decided on a case-by-case basis.

Framed this way, the attack on local rules seems simply silly even though the distinction is useful. Apparently there is a broad area to which judicial discretion extends, in which a judge may make an identical determination in every case as long as no rule is promulgated. (Presumably, the policy could be published in an opinion, but not a local rule.) A presumption against publication invites the evil many critics would remedy.

Local rules are no "booby trap" for foreign lawyers: the real booby trap is the local procedure that is *not* published. The late Chief Judge Mac Swinford used to say, "We don't have local rules in this court. Our lawyers know what we expect of them." That situation truly imposes a need for local counsel on foreign lawyers. Comprehensive local rules at least provide initial familiarity with local practice.

A useful tool

Rulemaking clearly cannot replace reasoned decision-making, but it can be an important channel of policy making. The courts are often criticized for imposing on other bodies policies based on scant information; they are seen as too ready to declare policy for others, especially public agencies.[33] But they sometimes seem hesitant to make policy for themselves.

A major theme in court management is that courts have done too little planning and policymaking with regard to their own operations.[34] Their reluctance is not surprising; rule- and policy-making are the opposite of their usual decisional mode of operation.[35] A rule defines future action on cases yet to appear; adjudication is based on a record built on past events. Where Judge Weinstein compares rule-making to legislation and finds the procedure wanting and the scope often improper, he has perhaps overlooked administrative policy-making as a more appropriate frame of reference.

30. David J. Saari, *Modern Court Management: Trends in Court Organization Concepts—1976*, 2 JUSTICE SYSTEM JOURNAL 23 (1967).

31. *See, generally*, Saari, *Modern Trends* and Geoff Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUSTICE SYSTEM JOURNAL 35-55 (1976), and citations therein.

32. *Supra* n. 6, at 1252.

33. *See, e.g.*, Nathan Glazer, *Towards An Imperial Judiciary?*, 41 THE PUBLIC INTEREST 104-123 (1975).

34. A valuable source for this issue is Russell R. Wheeler and Donald W. Jackson, *Judicial Councils and Policy Planning*, 2 JUSTICE SYSTEM JOURNAL 121-140 (1976).

See also Russell R. Wheeler, *Planning in the State Courts* and Donald W. Jackson, *Program Evaluation in Judicial Administration*, in Larry C. Berkson, Steven W. Hays, and Susan J. Carbon, eds., MANAGING THE STATE COURTS 337-356. St. Paul: West, 1977.

35. Weinstein, *supra* n. 3, chapter 1.

Looking at rules as a part of policy helps answer a few questions but raises others. If rules are an essential part of running a court and charting its future, it is beside the point to complain of their number or scope. Local rules can define and regulate practice on certain matters of the normal operation of the courthouse.[36] They can define the routine to govern important elements of the conduct of litigation.[37] They can provide information about statutory plans,[38] and they can describe the administrative organization of the court.[39]

Many U.S. courts, in my view, make too little effort to take advantage of local rules as a device to hammer out agreement on court-wide procedural policies. The result is that many rules are the pet projects of a few judges, and have no bearing at all on the activities of many or most. Also, the rules are often narrower in scope than they should be.

Diversity among courts seems unavoidable. Because judges on any particular court differ from one another in their history, training, and attitude to procedural questions, diversity *within* a court is probably inevitable as well. The most common complaint I have heard from lawyers is the difficulty in practicing law where procedures differ widely from judge to judge.[40] Among the 10 courts we visited for a district court research project, some had done a remarkable job in hammering out consistent policies which all judges could live with on most of the day-to-day procedural questions a lawyer faces. Those, however, were the few not subject to this complaint.

36. *See, e.g.*, Rule 6 of the Northern District of Alabama on "Removal of Court Files and Exhibits."

37. *See, e.g.*, Rule 3 of the Eastern District of Louisiana on "Motions." It covers motion days, setting motions for hearing, and calendar.

38. *See, e.g.*, Rule 21 of the Northern District of Florida on "Court Plans," which covers a plan for the assignment of counsel to represent indigent defendants in criminal proceedings, a plan for the random selection of grand and petit jurors and a plan to minimize undue delay and further prompt disposition of criminal cases (Speedy Trial Act).

39. *Supra* n. 28.

40. *Supra* n. 1. This point is made also in the "Report Evaluating the Individual Assignment System in the Southern District of New York After Three Years Experience" (Assn. of the Bar of the City of New York, July, 1975), pp. 5-6.

Two questions

As this larger context is explored, two difficult questions probably will be illuminated —questions which, I am frank to say, I cannot confidently answer now. The first concerns how far rule-making can extend and not intrude on decision-making. I have tried to show that a minimalist position will not do. On the other hand, it cannot be that any consistent and lawful action of a court is suitable for transmutation into a rule.

Though nearly all prisoner petitions are dismissed as frivolous, for example, it does not follow that this result represents a policy. Thus, no court should promulgate a rule that "All prisoner petitions filed in this district shall be dismissed as frivolous." Courts must read every petition; if most are dismissed, that cannot be a matter of policy, determined in advance. The critics would have us believe that many local rules commit this error. While I think that is demonstrably untrue, all of us need further definition of the desirable scope of court policy. It must be broad enough to help courts do their jobs well, now and in the future. It must not pre-empt adjudication of controversies.

My second open question is how far a court should go in trying to bind judges who dissent from a local rule. Rule 83 requires only a majority of district judges when a rule is created. When we realize also that new judges will be appointed who did not vote we find, in toto, many judges who may not support a rule. Enforcement is difficult, though no more so than for national rules. In general, perhaps courts should avoid promulgating a rule unless dissenting judges feel they can live with it, and rules should be reopened as new judges are appointed.

Recommendations

Once we understand the significance of the local rule-making power, it is still possible to criticize several aspects of the exercise of this power. The first is the way in which the rules are drafted, the second the way in which they are promulgated; the third is the lack of binding power of the rules themselves; and last—and most important—is the occasional lack of consistency with national law.

Consultation: Judge Weinstein and others are rightly concerned about the manner in which local rules are drafted, reviewed, and promulgated. He argues that rule-making is to be understood and evaluated under theories of legislative delegation, and finds it wanting from that perspective. He recommends hearings, notification, and a substantial opportunity for comment.[41] I find all this useful and probably inarguable. However, I have some doubt that local rules that simply do what local rules should—to codify existing policy or practice that is consistent with higher levels of law—need to be dealt with or evaluated through the imposing intellectual apparatus Judge Weinstein brings to bear on them. But it certainly seems good practice for any government agency to provide an opportunity for public comment before drafting regulations, as most agencies are required to do by the courts.

Promulgation: If a district has a lawful, consistent, and predictable policy, a positive service is performed by publishing a concise and useful description of that policy. If court-wide procedures are to be publicized, local rules seem the best way, by contrast with general orders or some other form that stops short of the formal local rule.

In his discussion of the implications of rule-making, Judge Weinstein argues that rule-making should be conservative and accurately describe practice, but he does not seem to offer any good alternative to local rules as a means to publicize local practice.[42] A uniform numbering system, which may be forthcoming, would be very desirable.[43]

Some districts have a vast proliferation of "general orders," whose status is unclear and whose distribution is spotty. The Central District of California has 181, in three large volumes. Of course, it is impossible to obtain a national collection of general orders. One reason I am wary of excessive consultation and review prior to promulgation is I would avoid procedures that make it difficult to promulgate a local rule.

Binding power: The judiciary appears to have a rather casual attitude toward local rules, particularly in the notion that the judge is not bound by them. Wright and Miller think local rules should be binding on the parties *and* the court, but that view is probably not widespread among judges.[44] Many local rules that impose pretrial requirements are enforced rigidly by some judges and only sporadically (or not at all) by others. A local rule should be generally consistent with actual practice of the court it governs (though it may be waived in a particular case) or it should be withdrawn.

Consistency: There *are* a number of direct conflicts. Although they have less cumulative force than the critics think, their existence certainly is troubling. It would appear wise for district courts to be conservative in future rule-making and eliminate existing conflicts. In particular, it would be wise to forego excursions along the lines suggested by the ABA Litigation Section, in their proposal that substantial modifications of discovery practice be adopted by local rule.[45]

Conclusion

What district courts should do in this area can, I think, be simply summarized. A district should maintain the most comprehensive possible body of local rules, provided that those rules meet the following standards, they should: (1) be lawful; (2) describe actual practice; (3) describe something attorneys need to know about; and (4) be promulgated following a process that provides a reasonable opportunity for participation and comment by the bar.

With those conditions, I think that the exercise of the local rulemaking power offers the federal district courts one of their best tools for responding to problems that national rules simply cannot address. □

41. Weinstein, *supra* n. 13, at 151.
42. Weinstein, *supra* n. 13.
43. *Supra* n. 16.
44. Wright and Miller, *supra* n. 4 at 224.
45. *See*, "Report of the Special Committee for the Study of Discovery Abuse" (American Bar Association Section on Litigation, October, 1977). At a 1977 session of the Conference of Metropolitan District Chief Judges (Brownsville, Texas, October, 1977), a section member suggested that several of the proposals be adopted by local rule. He especially suggested a limitation of 30 interrogatories, unless leave of court is obtained.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1940

SIBBACH *v.* WILSON & CO., INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 28. Argued December 17, 1940.—Decided January 13, 1941.

1. Congress has power to regulate the practice and procedure of federal courts, and may exercise it by delegating to the Supreme or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States. P. 9.
2. The Act of June 19, 1934, empowering the Supreme Court to prescribe rules for the District Courts of the United States in civil actions, was restricted in its operation to matters of pleading, practice and procedure. P. 10.
3. In so far as they are within the authority granted by Congress, the Rules of Civil Procedure prescribed by the Supreme Court under authority of the Act of June 19, 1934 repeal the Conformity Act. P. 10.
4. Rule 35 of the Rules of Civil Procedure for the District Courts of the United States, which provides that, in a suit in which the physical or mental condition of a party is in controversy, the court may order the party to submit to a physical or mental examination by a physician, *held* within the authority granted by Congress in the Act of June 19, 1934, and consistent with the limitation of that Act that the rules prescribed shall not abridge, enlarge or modify the "substantive rights" of any litigant. P. 14.
5. *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250, and *Camden & Suburban Ry. v. Stetson*, 177 U. S. 172, explained. P. 11.
6. Rules 35 and 37 of the Rules of Civil Procedure are rules of procedure, and their prescription did not exceed the authority granted by the Act of June 19, 1934 merely because they involve "important" or "substantial" rights. P. 13.

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7. That Congress reserved the power to examine, before they should become effective, rules proposed pursuant to the Act, and took no adverse action in respect of Rule 35, indicates that no transgression of legislative policy was found. P. 15.
8. Refusal to obey an order under Rule 35 requiring a party to submit to a physical or mental examination is exempted by Rule 37 (b) (2) (iv) from punishment as for a contempt. The remedies for such refusal are those enumerated in Rule 37 (b) (2) (i), (ii), and (iii). P. 16.
9. The action of the District Court in this case, punishing as for contempt a refusal to obey an order under Rule 35 requiring a plaintiff to submit to a physical examination, was such plain error as this Court may notice, although not assigned or specified either in the Circuit Court of Appeals or here. P. 16.

108 F. 2d 415, reversed.

CERTIORARI, 309 U. S. 650, to review the affirmance of an order committing for contempt.

Mr. James A. Velde, with whom *Messrs. Royal W. Irwin* and *Lambert Kaspers* were on the brief, for petitioner.

It may be that an order compelling the plaintiff to submit to a physical examination does not determine the right which the plaintiff seeks to have adjudicated in the litigation, and in that aspect involves "procedure" and not "substantive law." Nevertheless, the order invades "substantive rights."

Does the field of "rights" excluded from the rule-making power include only the rights that determine the outcome of litigation, the ultimate rights sought to be adjudicated by the litigants? Clearly, Congress may not delegate to the courts the power to declare by rule what rights of this character exist.

Procedural devices may invade human rights that the common law has long sought to protect. The doctrine of the separation of powers alone, apart from other constitutional limitations, forbids Congress to delegate rule-making power as to a procedural device of this character.

The question is whether the particular matter is "exclusively legislative" or "judicial."

If the matter involves a general principle or a question of public policy that the legislature is able to pass upon, it should not be dealt with by a rule of court, but by a legislative enactment.

Obvious examples of procedural devices that affect important rights, and so involve broad questions of policy, are those that violate constitutional limitations, such as the due process clause. See *Kring* v. *Missouri*, 107 U. S. 221.

Common law privileges and inhibitions against testifying—such as the disability of a party to testify or of one spouse to testify for or against the other—are a part of the law of evidence and so within the field of "procedure." Yet, whether or not they should have a place in our legal system is of great public interest,—an important question of public policy. May Congress delegate to the courts the power to determine such questions by court rule?

Apparently Congress believed, since procedure may extend to the line where "substantive law" begins, it was desirable not to delegate to the Court the power to make rules that abridge, enlarge, or modify some important rights involved in procedure. It is significant that the Act uses the words "substantive rights" rather than "substantive law."

If rules of "procedure" could not be construed to involve "substantive rights," the second sentence in the Act would be surplusage.

Decisions of this Court indicate that an order for a physical examination modifies substantive rights. *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250; *Camden & Suburban Ry. Co.* v. *Stetson*, 177 U. S. 172.

Rule 35 is grouped with others under the heading "Depositions and Discovery." While it may seem to

law but between two classes of procedural law. One of these would include ordinary matters and be within the rule-making power. The other would include substantial and important matters and not be within the rule-making power. Such a theory would make the practice and procedure of the federal courts far more confusing than it was before the rules were promulgated.

Moreover, any such theory would nullify many of the rules. A casual review of merely the headings will show that many deal with "substantial" and "important" matters.

Rule 35 does not discriminate against plaintiffs.

Mr. William D. Mitchell filed a brief, as *amicus curiae*, urging that Rules 35 and 37 do not authorize arrest or imprisonment for refusal to obey an order for physical examination; and, so construed, are valid.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case calls for decision as to the validity of Rules 35 and 37 of the Rules of Civil Procedure for District Courts of the United States.[1]

In an action brought by the petitioner in the District Court for Northern Illinois to recover damages for bodily injuries, inflicted in Indiana, respondent answered denying the allegations of the complaint, and moved for an order requiring the petitioner to submit to a physical examination by one or more physicians appointed by the court to determine the nature and extent of her injuries. The court ordered that the petitioner submit to such an examination by a physician so appointed.

Compliance having been refused, the respondent obtained an order to show cause why the petitioner should

[1] 28 U. S. C., following § 723c.

not be punished for contempt. In response the petitioner challenged the authority of the court to order her to submit to the examination, asserting that the order was void. It appeared that the courts of Indiana, the state where the cause of action arose, hold such an order proper,[2] whereas the courts of Illinois, the state in which the trial court sat, hold that such an order cannot be made.[3] Neither state has any statute governing the matter.

The court adjudged the petitioner guilty of contempt, and directed that she be committed until she should obey the order for examination or otherwise should be legally discharged from custody. The petitioner appealed.

The Circuit Court of Appeals decided that Rule 35, which authorizes an order for a physical examination in such a case, is valid, and affirmed the judgment.[4] The writ of certiorari was granted because of the importance of the question involved.

The Rules of Civil Procedure were promulgated under the authority of the Act of June 19, 1934,[5] which is:

"Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive

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[2] *South Bend* v. *Turner*, 156 Ind. 418; 60 N. E. 271; *Aspy* v. *Botkins*, 160 Ind. 170; 66 N. E. 462; *Lake Erie & W. R. Co.* v. *Griswold*, 72 Ind. App. 265; 125 N. E. 783; *Valparaiso* v. *Kinney*, 75 Ind. App. 660; 131 N. E. 237.

[3] *Chicago* v. *McNally*, 227 Ill. 14; 81 N. E. 23; *Mattice* v. *Klawans*, 312 Ill. 299; 143 N. E. 866; *Illinois* v. *Scott*, 326 Ill. 327; 157 N. E. 247.

[4] 108 F. 2d 415.

[5] c. 651, 48 Stat. 1064; 28 U. S. C. § 723 b, c.

rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

The text of the relevant portions of Rules 35 and 37 is:

"Rule 35. Physical and Mental Examination of Persons.

"(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

"Rule 37. Refusal to Make Discovery: Consequences.

"(a) Refusal to Answer. . . .

"(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party . . . refuses to obey . . . an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that . . . the physical or mental condition of the party, . . . shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order . . . prohibiting [the disobedient party] from introducing . . . evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

The contention of the petitioner, in final analysis, is that Rules 35 and 37 are not within the mandate of Congress to this court. This is the limit of permissible debate, since argument touching the broader questions of Congressional power and of the obligation of federal courts to apply the substantive law of a state is foreclosed.

Congress has undoubted power to regulate the practice and procedure of federal courts,* and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes

* *Wayman* v. *Southard*, 10 Wheat. 1, 21; *Bank of the United States* v. *Halstead*, 10 Wheat. 51, 53; *Beers* v. *Haughton*, 9 Pet. 329, 359, 361.

or constitution of the United States; [7] but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts.[8]

Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not "abridge, enlarge, nor modify substantive rights," in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.[9]

Whatever may be said as to the effect of the Conformity Act [10] while it remained in force, the rules, if they are within the authority granted by Congress, repeal that statute, and the District Court was not bound to follow the Illinois practice respecting an order for physical examination. On the other hand if the right to be exempt from such an order is one of substantive law, the Rules

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[7] *Wayman* v. *Southard, supra,* 42; *Bank of the United States* v. *Halstead, supra,* 61; *Beers* v. *Haughton, supra,* 359.

[8] R. S. 721, 28 U. S. C. § 725.

[9] *Hudson* v. *Parker,* 156 U. S. 277, 284; *Venner* v. *Great Northern Ry. Co.,* 209 U. S. 24, 35; *Davidson Marble Co.* v. *Gibson,* 213 U. S. 10, 18; *Meek* v. *Centre County Banking Co.,* 268 U. S. 426, 434.

[10] R. S. 914; 28 U. S. C. § 724.

of Decision Act [11] required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose, and to order the examination. To avoid this dilemma the petitioner admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure. She insists, nevertheless, that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates "substantive" into "important" or "substantial" rights. And she urges that if a rule affects such a right, albeit the rule is one of procedure merely, its prescription is not within the statutory grant of power embodied in the Act of June 19, 1934. She contends that our decisions and recognized principles require us so to hold.

The petitioner relies upon *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 250, and *Camden & Suburban Ry. Co.* v. *Stetson,* 177 U. S. 172. But these cases in reality sustain the validity of the rules. In the *Botsford* case an action to recover for a personal injury suffered in the territory of Utah [12] was instituted in the United States Circuit Court for Indiana, which refused to order a physical examination. This court affirmed, on the ground that no authority for such an order was shown. There was no suggestion that the question was one of substantive law. The court first examines the practice at common law and finds that it never recognized such an order. Then, acknowledging that a statute of the United States authorizing an order of the sort would be valid, the opinion finds there is none. Thus the matter is treated as one of procedure, for Congress has not, if it could, declared by statute the substantive law of a state. After

[11] *Supra,* note 8.

[12] The opinion does not so state, but the record filed in this court so shows.

stating that the decision law of Indiana on the subject appeared not to be settled, and that a cited statute of that State was not in point, the court added that the question was not one of the law of Indiana but of the law of the United States and that the federal statutes by their provisions as to proof in actions at law precluded the application of the Conformity Act. Again, therefore, the opinion recognized that the matter is one of procedure, for both the cited federal statutes, concerning the mode of proof in federal courts, and the Conformity Act, deal solely with procedure.

In fine, the decision was only that the making of such an order is regulable by statute, that the federal statutes forbade it, and hence the Conformity Act could not be thought to authorize the practice by reference to and incorporation of state law.

In the *Stetson* case the action was brought in the District Court for New Jersey by a citizen of Pennsylvania, who, while a citizen of New Jersey, had been injured in the latter state. A statute of New Jersey authorized the state courts to order a physical examination of a plaintiff in an action for damages pending therein. The District Court refused to order such an examination on the ground that it lacked power so to do. After a verdict and judgment for plaintiff the defendant appealed to the Circuit Court of Appeals, assigning the refusal as error. That court certified the question, and this court answered that the District Court had power to order the examination.

The court stated that in the *Botsford* case there was no statute authorizing such an order, but said that here there was a state statute which by the Rules of Decision Act was made a law of the United States and must be given effect in a trial in a federal court. While it is true the court referred to the Rules of Decision Act (R. S. 721) and not to the Conformity Act (R. S. 914) the

entire discussion goes upon the assumption that the matter is procedural. In any event, the distinction between substantive and procedural law was immaterial, for the cause of action arose and the trial was had in New Jersey.[13]

In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, and neither the *Botsford* nor the *Stetson* case is authority for ignoring it.

The remaining case on which petitioner leans is *Stack* v. *New York, N. H. & H. R. Co.*, 177 Mass. 155; 58 N. E. 686, where the court agreed with the view expressed in the *Botsford* case that common-law practice did not warrant the entry of such an order and said it was for the legislature rather than the courts to alter the practice. But if Rule 35 is within the authority granted, the federal legislature sanctioned it as controlling all district courts.

We are thrown back, then, to the arguments drawn from the language of the Act of June 19, 1934. Is the phrase "substantive rights" confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one's person by another's negligence, to redress infraction of which the present action was brought. The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination.[14] In a number such an order is author-

[13] As above pointed out, if the matter is one of substantive law, R. S. 721 requires the application of the law of Indiana, which authorizes an order for examination.

[14] See Wigmore on Evidence (3d Ed.) § 2220, note 13.

ized by statute or rule.[15] The rules in question accord with the procedure now in force in Canada and England.[16]

The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states, before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that, as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with its provisions. If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

Finally, it is urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. Apart from the fact already stated, that the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were sub-

[15] See Notes to the Rules of Civil Procedure, printed by the Advisory Committee March 1938, p. 32.

[16] Wigmore on Evidence (3d Ed.) § 2220, note 13; 31 & 32 Vict. c. 119, § 26.

mitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.[17] Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses.[18] The Preliminary Draft of the rules called attention to the contrary practice indicated by the *Botsford* case, as did the Report of the Advisory Committee and the Notes prepared by the Com-

[17] An analogy is found in the organic acts applicable to some of the territories, before their admission to statehood, which provided that laws passed by the territorial legislature should be valid unless Congress disapproved. § 5 of the Ordinance of 1787; see *Pease* v. *Peck*, 18 How. 595. Territory of Florida, § 5 of the Act of March 30, 1822 (3 Stat. 655); territory of Louisiana, § 4 of the Act of March 26, 1804 (2 Stat. 284), and § 3 of the Act of March 3, 1805 (2 Stat. 331); territory of Minnesota, § 6 of the Act of March 3, 1849 (9 Stat. 405); territory of New Mexico, § 7 of the Act of September 9, 1850 (9 Stat. 449); territory of Oregon, § 6 of the Act of August 14, 1848 (9 Stat. 326); territory of Utah, § 6 of the Act of September 9, 1850 (9 Stat. 455); territory of Washington, § 6 of the Act of March 2, 1853 (10 Stat. 175); territory of Wisconsin, § 6 of the Act of April 20, 1836 (5 Stat. 13). Similar provisions are now applicable to Alaska, Puerto Rico, the Virgin Islands and the Philippines. 48 U. S. C. §§ 90, 826, 1405(o), 1054.

Cf. the provisions for lying over before Congress in § 407 of the Act of March 3, 1933 (47 Stat. 1519), and § 5 of the Reorganization Act of 1939 (53 Stat. 562).

[18] Hearings before the Committee on the Judiciary, House of Representatives, 75th Cong., 3rd Sess., pp. 117, 141; Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 75th Cong., 3rd Sess., pp. 36–37, 39, 51.

mittee to accompany the final version of the rules.[19] That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.

The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it.[20] Section (b) (2) (iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. The remedies available under the rule in such a case are those enumerated in § (b) (2) (i) (ii) and (iii). For this error we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting:

Union Pacific Ry. Co. v. *Botsford*, 141 U. S. 250, denied the power of the federal courts in a civil action to compel a plaintiff suing for injury to the person to submit to a physical examination. Nine years later, in *Camden & Suburban Ry. Co.* v. *Stetson*, 177 U. S. 172,

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[19] Preliminary Draft (May, 1936) of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, Advisory Committee on Rules for Civil Procedure, p. 71; Notes to the Rules of Civil Procedure for the District Courts of the United States (March, 1938), p. 32.

[20] Supreme Court Rule 27, par. 6; *Mahler* v. *Eby*, 264 U. S. 32, 45; *Kessler* v. *Strecker*, 307 U. S. 22, 34.

the *Botsford* decision was treated as settled doctrine. The present issue is whether the authority which Congress gave to this Court to formulate rules of civil procedure for the district courts allows displacement of the law of the *Botsford* case. Stated more particularly, is Rule 35, authorizing such physical examination, valid under the Rules Enabling Act of June 19, 1934; 48 Stat. 1064; 28 U. S. C. § 723b-c. It is urged that since this Rule pertains to procedure, it is valid because outside the limitations of that Act, whereby "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Speaking with diffidence in support of a view which has not commended itself to the Court, it does not seem to me that the answer to our question is to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, even assuming that the two are mutually exclusive categories with easily ascertainable contents. The problem seems to me to be controlled by the policy underlying the *Botsford* decision. Its doctrine was not a survival of an outworn technicality. It rested on considerations akin to what is familiarly known in the English law as the liberties of the subject. To be sure, the immunity that was recognized in the *Botsford* case has no constitutional sanction. It is amenable to statutory change. But the "inviolability of a person" was deemed to have such historic roots in Anglo-American law that it was not to be curtailed "unless by clear and unquestionable authority of law." In this connection it is significant that a judge as responsive to procedural needs as was Mr. Justice Holmes, should, on behalf of the Supreme Judicial Court of Massachusetts, have supported the *Botsford* doctrine on the ground that "the common law was very slow to sanction any viola-

tion of or interference with the person of a free citizen." *Stack* v. *New York, N. H. & H. R. Co.*, 177 Mass. 155, 157; 58 N. E. 686.

So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts. I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation. That disobedience of an order under Rule 35 cannot be visited with punishment as for contempt does not mitigate its intrusion into an historic immunity of the privacy of the person. Of course the Rule is compulsive in that the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination.

In this view little significance attaches to the fact that the Rules, in accordance with the statute, remained on the table of two Houses of Congress without evoking any objection to Rule 35 and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality. And so I conclude that to make the drastic change that Rule 35 sought to introduce would require explicit legislation.

Ordinarily, disagreement with the majority on so-called procedural matters is best held in silence. Even in the present situation I should be loath to register dissent did

the issue pertain merely to diversity litigation. But Rule 35 applies to all civil litigation in the federal courts, and thus concerns the enforcement of federal rights and not merely of state law in the federal courts.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY agree with these views.

GORIN *v.* UNITED STATES.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 87. Argued December 19, 1940.—Decided January 13, 1941.

1. In order to constitute the crimes denounced by §§ 1 (b) and 2 of the Espionage Act—the obtaining of documents connected with or relating to the national defense and their delivery to an agent of a foreign country with an intent, or reason to believe, in each case, that they are to be used to the injury of the United States or to the advantage of a foreign nation—it is not necessary that the documents contain information concerning the places or things (such as vessels, aircraft, forts, signal stations, codes or signal books) which are specifically mentioned in § 1 (a) of the Act. P. 25.
2. "National defense" as used in §§ 1 (b) and 2 of the Espionage Act refers to the military or naval establishments and to related activities of national preparedness for war. P. 28.
3. With this meaning of "national defense" and with the elements of *scienter* and bad faith which must be present, the sections are sufficiently definite to apprise the public of the activities they prohibit; and they accord with due process. P. 27.
4. Information taken from reports in the files of the Naval Intelligence, giving a detailed picture of counter-espionage work, *held* capable of use to the injury of the United States or to the advantage of a foreign nation, within the meaning of §§ 1 and 2 of the Espionage Act. P. 29.

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*Together with No. 88, *Salich* v. *United States*, also on certiorari, 310 U. S. 622, to the Circuit Court of Appeals for the Ninth Circuit.

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